

VERBATIM <sup>1</sup>RECORD OF TRIAL <sup>2</sup>

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERAL

COURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

## Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

1 Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

2 See inside back cover for instructions as to preparation and arrangement.

1 me earlier that nobody was going to participate unless the case was  
2 referred?

3 TC[MAJ FEIN]: Well, not no one, Your Honor, the majority of  
4 organizations. This request in 6 October 2011 was to organizations  
5 that we knew had completed or we didn't know had had completed damage  
6 assistants that we were with closely. So, this would be the FBI,  
7 this would be the Department of Defense through the IRTF, United  
8 States Cyber Command. We had asked for any evidence that we could  
9 use to start developing our sentencing case other than what we  
10 already had. That was a written request. We submitted those and we  
11 did receive responses back. So, some of it also did or would have  
12 answered the defense's recovery request we had answered either not --  
13 whatever authority they gave and we were preparing those documents.  
14 If an authority wasn't adequate, or they -- it just wasn't specific  
15 enough. Whatever it was, Your Honor, but if these were those and  
16 they fell into those discovery requests, we have them ready for  
17 litigation and then we would have even produced -- what we received  
18 without the Court's involvement, or if the Court was involved, it  
19 would have been because had to do a an M.R.E. 505 motion. It was not  
20 the Department of State, for instance, which the Court's heard plenty  
21 of evidence on, that we hadn't even seen it until the Court ordered,  
22 and then it be produced and then the prosecution was finally able to  
23 see it. And then that's when the prosecution did a motion to

1 reconsider. Only at that point did the prosecution even get to see  
2 that.

3 MJ: Okay.

4 TC[MAJ FEIN]: 20 October, 492 pages produced, Your Honor, and  
5 then during this time, 62 defense emails including one email with  
6 Article 32 IO spanning 21 days.

7 Your Honor, 28 October to 15 November -- 4 November, again,  
8 we already talked about this but it's a highlight during this period  
9 of time, discovery production of the forensic reports and-that's, I  
10 think shows when you asked the majority of the evidence went, on this  
11 day, it's because of forensic reports which essentially print out to  
12 329,0000 pages, almost all classified. 8 November was the first  
13 briefing, 327 PowerPoint slide show and, implied there, just like I  
14 mentioned before, at this charge sheet, Your Honor, if the  
15 prosecution is presenting its entire case to the defense, it has to  
16 actually put that together. Defense requested this presentation and  
17 so, before this time, that was also occurring simultaneous with  
18 everything else, Your Honor.

19 MJ: Did defense request the 8 November as well as the 9  
20 November presentations.

21 TC[MAJ FEIN]: No, Your Honor, what it is 8 November the  
22 prosecution offered in October to do this briefing. Defense said,  
23 "Yes, we would like it," and the first one, Your Honor, was on 8

1 November; that was to the defense counsel and all the defense experts  
2 that defense invited. On 9 November, the following day, defense  
3 requested that the prosecution do a modified briefing not the same  
4 one, not the 327 slides, but a slightly modified one for the accused,  
5 himself, at Fort Leavenworth. So the prosecution then flew out to  
6 Fort Leavenworth and we'll get to that in the next period of delay --  
7 apparent delay -- inactivity, excuse me flew out there based off that  
8 request and gave that presentation with a different slide show. So,  
9 during this time, Your Honor, 28 October to 15 November, 70 defense  
10 emails back and forth including 8 emails with the Article 32 IO over  
11 only 13 days.

12 Now, Your Honor, this is the time -- the remaining time  
13 before the Article 32 restarted, 17 November to 15 December.  
14 Defense, it appears, is not contesting 16 November; it's a gap  
15 between the days. The convening authority did act on that days to  
16 restart the 32. Your Honor, on 17 November, the government produced  
17 5,000 pages in discover including a classification review. 18  
18 November is when the prosecution presented its entire case on a 258-  
19 slide power point presentation to the accused, himself, and Mr.  
20 Coombs at Fort Leavenworth. Again, there's a briefing there  
21 different briefing. The prosecution hasn't spent time on just that  
22 10-day period preparing that concurrent with everything else. 23  
23 November-1 December, discovery productions of over 25,000 pages. 6-9



1 December, discovery productions of 2,700 pages. And this part, Your  
2 Honor, during this period of time, approximately a little under 1  
3 month, 19 duty days, the defense and prosecution have 254 emails  
4 between them and 120 of them dealt with the Article 32 investigation  
5 because it was with the Article 32 IO all the emails Article 32  
6 issues.

7           The next alleged apparent inactivity period, Your Honor,  
8 now this is immediately after the Article 32 completed and before 3  
9 January, on 2 January 2012, trial counsel requested meetings to  
10 request prudential search requests for three different organizations;  
11 that is shown in emails in Enclosure 1. On 3 January 2012, trial  
12 counsel requested the Article 32 IO exclude any period of time they  
13 did not work on the report, to which the defense did not object to at  
14 the time, even though they were on the email. And during this time,  
15 Your Honor, there was four defense emails spanning 5 duty days. And  
16 the convening authority acted on a memorandum which also means there  
17 was a command briefing at that time.

18           The next period of time, Your Honor, 12 January to 2  
19 February, the day before referral. On 12 January there's a discovery  
20 production of 87 pages including the ODNI classification review. On  
21 16 January, defense submitted a deposition request which the  
22 prosecution started processing. 18 January, trial counsel notified  
23 the defense of Colonel Coffman's transmittal of the case to the GCMCA

1 with a recommendation of a general court-martial. Implied on that,  
2 Your Honor, or implied with 18 January is that Colonel Coffman had to  
3 be briefed, had to review the file, and did actually spend 3, almost  
4 complete, days reviewing the entire record. Also, what's not noted  
5 here, Your Honor, is the 5-day period after the Article 32 IO  
6 completed his report, the 5-day objection period, which the report  
7 included an explanation by Lieutenant Colonel Almanza on why he  
8 granted a delay and defense never objected to any portion of that  
9 report nor never objected to the convening authority on any delay  
10 granted by the IO. On 20 January, 82 pages were produced. On 26 and  
11 27 January, defense requested additional funding for an expert and  
12 there was a discovery production and trial counsel responded to  
13 outstanding defense discovery requests. 3 February, the referred --  
14 charges were referred, Your Honor. So, during this period of time,  
15 there were 77 defense emails over 16 duty days.

16 So, Your Honor, in conclusion of this oral -- of this fact  
17 portion of the oral argument, there are multiple lanes that were  
18 being travelled by the prosecution: pretrial and, still, post-  
19 referral in order to move this case to trial under Article 10 that  
20 provided the convening authority and, for that short period of time,  
21 the investigating officer, facts that allowed them to reasonably --  
22 make reasonable decisions to grant delays. These are the major  
23 categories and this was all happening concurrently. This is not the

1 case -- the most recent, probably, case on point, the *Collins* case  
2 from A.C.C.A. where -- I'm sorry, *Simmons* where the prosecution in  
3 Korea was working a SOFA issue, did nothing else, was working an  
4 evidence issue, and did not thing else. The isn't any of the other -  
5 - in the entire case law of Article 10 where prosecution continually  
6 worked this -- a case where there was ever found an Article 10  
7 violation because there was continual movement. The standard is not  
8 continual or constant movement, but the evidence that we've presented  
9 to the Court, today and, ultimately, in our filings will show that  
10 there has been constant movement and at a minimal reasonable  
11 diligence, by the prosecution in bringing this case to trial. So,  
12 pending any questions on the law or facts, Your Honor, that concludes  
13 my oral argument.

14 MJ: No, I think I've asked them during the course of the oral  
15 argument. What I would ask is send me the slide show electronically  
16 ----

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: ---- that you have. I would also ask that you put a list  
19 together of the cases that you've referenced with their citations.  
20 What I intend to do is go through those case and if I don't have  
21 written copies of them, I'm going to ask -- I'll send it back and ask  
22 that the government provide this to me.

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: All right. Defense, it's 10 minutes after 1300. You're  
2 next, how would you like to proceed?

3 CDC[MR. COOMBS]: Yes, Your Honor. If we could take a lunch  
4 break until 1430 and then just pick up right -- and go from there.

5 MJ: All right. We could talk later. Come see me -- I'll  
6 recess the court and then I'd like to talk to the parties briefly in  
7 an 802. So, we will recess for a lunch break and any objections,  
8 Major Fein?

9 TC[MAJ FEIN]: No, ma'am, we would like to meet with the Court  
10 just to discuss the way forward.

11 MJ: All right. We'll have a lunch break until 1430 when we  
12 will reconvene. Court is in recess.

13 **[The Article 39(a) session recessed at 1314, 16 January 2012.]**

14 **[The Article 39(a) session was called to order at 1438, 16 January**  
15 **2013.]**

16 MJ: This Article 39(a) session is called to order. Let the  
17 record reflect all parties present when the court last recessed are  
18 again present in court.

19 Mr. Coombs?

20 CDC[MR. COOMBS]: Yes, Your Honor.

21 Your Honor, my argument will be broken down under two main  
22 categories, the R.C.M. 707 argument in the Article 10 argument. For  
23 the R.C.M. 7 [sic] argument, it might be helpful to capture some time

1 periods in which there is an agreement at this time counts against  
2 the government's clock for R.C.M. 707 purposes. This information can  
3 be pulled from Appellate Exhibit 330, this is the government's speedy  
4 trial chronology, but for the aid of the Court, I will break down the  
5 periods for the Court right now.

6           27 May 2010 is the first day in confinement, so obviously  
7 that day does not count. The first day counting for purposes of the  
8 707 clock is 28 May 2010. From 28 May 2010 to 11 July 2010, the  
9 government concedes that that counts against them; that is 45 days.  
10 On 12 July 2010, the Special Court-Martial Convening Authority for  
11 the previous command granted a R.C.M. 706 board request and delayed  
12 the Article 32 hearing, so from that day forward, the government  
13 believes from 12 July 2010 to 16 December 2011, that those days do  
14 not count for R.C.M. 707 purposes; and, that totals 523 days. From  
15 16 December, 2011, through 23 December 2011, that is the Article 32  
16 hearing and that is eight days. And that gets us up to 53 days. And  
17 then, from 3 January 2011, excuse me, 2012, through 11 January 2012,  
18 the government concedes that those 9 days count against it. And,  
19 that gets us up to 62 days. And then, from 12 January 2012 to 3  
20 February 2012, the government concedes on 3 February is our 802  
21 session. And I guess it is up to -- that is 23 days and that gets us  
22 up to 85 days.

1           So, we have challenged times for the R.C.M. 707 clock and  
2 also these -- some of these times that the defense would argue apply  
3 toward the Article 10 clock. We have 13 separate challenged times  
4 and I will go through each of those. The first is not in the  
5 chronological order, but perhaps the easiest to apply against the  
6 government, and that is the time excluded by Lieutenant Colonel  
7 Almanza. This is from 24 December 2010 to 2 January 2000, excuse me,  
8 24 December 2011 to 2 January 2012, a total of 10 days. On 3 January  
9 2012, the government sent to Lieutenant Colonel Almanza an e-mail  
10 saying, "Look, exclude any days that are federal holidays or weekends  
11 or days you just did not work on the 32 report." And, Lieutenant  
12 Colonel Almanza made a reply back, "Yes, will do that." But, in our  
13 hearing, where he testified, he admitted that he wasn't even  
14 considering excluding those 10 days until the government asked him to  
15 do so. In fact, he said he never excluded anything under 707 prior  
16 to this exclusion. He admitted ----

17       MJ: Is there any issue with that, that the government cannot  
18 request an exclusion?

19       CDC[MR. COOMBS]: There is when there is no legal basis to  
20 exclude federal holidays and weekends. And, for that ----

21       MJ: I understand that, but is there any law or anything out  
22 there that says government cannot request a delay? Or, am I  
23 understanding ----

1 CDC[MR. COOMBS]: Request a delay?

2 MJ: Request excusal, excuse me.

3 CDC[MR. COOMBS]: No, I mean if there were an appropriate good-  
4 faith reason for excluding the time, sure.

5 MJ: Okay.

6 CDC[MR. COOMBS]: So, Lieutenant Colonel Almanza said, "You  
7 know, I was not even planning on doing that." And then, in fact,  
8 testified in hindsight some of those days were days in which he went  
9 into civilian employment and he said, "You know what, I should have  
10 told my civilian employer I cannot come in, I need to work on this  
11 32." Other days, one of those days he took his son to a swim meet, a  
12 weekend. And he said, "You know what, I should not have done that.  
13 I should have worked on the IO report." And, *United States v.*  
14 *Duncan*, 34 MJ 1232, clearly states that weekends count for the speedy  
15 trial clock. So in this instance, there is no good faith basis to  
16 exclude federal holidays or weekends. Those are days in which PFC  
17 Manning was in pretrial confinement. He did not get released from  
18 pretrial confinement for the federal holidays or weekends and  
19 certainly the speedy trial clock does not give a timeout for the  
20 government for those days either. So, if the Court adds those 10  
21 days in, now we get up to 95 days.

22 The second time period is 12 July 2010 to 10 August 2010;  
23 it is a 30-day period, and this entire period should count against

1 the government for Article 10 purposes but for the 707, I want to  
2 break it down into two separate groups. On 12 July you do have a  
3 defense counsel requesting a delay in the Article 32 hearing until a  
4 706 board can be completed. And, that delay -- you actually have  
5 multiple requests, but the 12 July request is granted. And from 12  
6 July to 28 July you have the government and the Convening Authority  
7 at that time taking steps in order to try to get a 706 board ginned  
8 up. On 28 July, you have a change in the convening authority. The  
9 case is transferred to MDW and it is clear at transfer, that  
10 transferred time period, Colonel Coffman, the Special Court-Martial  
11 Convening Authority is not looking at the 706 board as being a basis  
12 for delaying the 32. He appoints a 32 IO on the 4th of August and  
13 directs that the 32 be completed within 10 days. On the stand he  
14 testified that absent a request from the defense, that the 32 would  
15 have begun and he would have expected it to begin and be completed  
16 within his 10-day time period that he gave. It is clear from that,  
17 from the 28 July to the date of our request which is 11 August when  
18 we asked for the 706 board to be appointed and for the 32 to be  
19 delayed, the government in this case, the special court-martial  
20 convening authority, was operating under the assumption that there  
21 was no outstanding delay. And so, certainly for the 707 purposes,  
22 that time period from 28 July to 11 August should count against the  
23 707 clock and that would be 14 days. Now, the government indicates



1 in this time period that they did do certain steps in order to be  
2 proactive but the question here was whether or not there was an  
3 actual 706 delay or a delay out there by the defense. And when you  
4 have the change of command, it was clear that the person who is in  
5 charge of that, the Special Court-Martial Convening Authority, would  
6 say, "No there was not."

7 MJ: Okay, how many days do you count for that?

8 CDC[MR. COOMBS]: 14, Your Honor.

9 MJ: Okay.

10 CDC[MR. COOMBS]: The second -- excuse me, the third time period  
11 is from 13 December 2010, that is the completion of the preliminary  
12 classification review to 3 February 2011, that is the date that  
13 Colonel Coffman ordered the 706 board to resume its work, that time  
14 period is 53 days. And this is probably the first example in a  
15 litany of examples of the government being reactive instead of  
16 proactive. Colonel Coffman himself testified that he would have  
17 expected that as soon as the preliminary classification review was  
18 completed, the 706 board would begin. And, there is good reason to  
19 believe that because he appointed the 76 board on 12 August 2010.  
20 The preliminary classification review, once I became involved in the  
21 case on 25 August of 2010, I raised a couple of issues that did, in  
22 fact, necessitate a delay. First and foremost was, had any thought  
23 been given to what PFC Manning might say to the 706 board and the

1 fact that that information might be classified. And, that discussion  
2 required a delay and we do not dispute that that delay was  
3 appropriate. But the government had then over 100 -- almost 100 days  
4 actually to get everything ready. They, themselves, indicate that  
5 they were on notice that TS-SCI clearance was probably going to be  
6 needed. Colonel Coffman indicated that, yes that is based upon your  
7 disclosure to us in August of 2010. We knew that TS-SCI was probably  
8 going to be the level. And here is where a proactive government  
9 would have said, "All right, let us get everything done and in a row.  
10 It does not hurt to have people with higher clearances than they need  
11 in order to complete the 706." But, what happened was, as soon as  
12 the preliminary classification review was completed, a period of 5  
13 days went by hearing nothing. And that is when the defense reached  
14 out to the government on 18 December 2010 and said, "Hey, you know,  
15 who is on the 706 board? When are they going to start? What is  
16 going on with the process?" And the government responded that they  
17 had not yet identified the 706 board members. And then, you see at  
18 that point then when they state that then there is a time period the  
19 goes by and it is not until 13 January 2011, that we submit our first  
20 speedy trial demand. And it is no mistake that that date is 13  
21 January because you have 13 December when the preliminary  
22 classification review is completed and we wait 1 month and there is  
23 no activity, no action on the 706 board. And obviously, the 706

1 board is going to be a prerequisite in order to complete before we  
2 can move forward in the process.

3           And so, at that point we make our speedy trial demand. And  
4 even still, the government is not in a position on 13 January 2011 to  
5 start the 706 board. They still are not in position to get people to  
6 begin their work because now they are trying to obtain their  
7 requisite security clearance for one of the members, again, something  
8 that could have been done much, much earlier. There also still no in  
9 the process of -- well, they are still in the process of trying to  
10 identify a place for the meeting -- the classified meeting to take  
11 place in a T-SCIF. It is not until 3 February to their actually  
12 ready to resume their work.

13           So, when you look at that time period, that 53-day time  
14 period between 13 December 2010 and 3 February 2011, the defense's  
15 position is those days should be laid at the doorstep of the  
16 government.

17           MJ: Let me ask you a question on that, it is the same question  
18 that the government. Do you have any case law saying the I mean,  
19 here in this case, the defense did not say, "I want a speedy trial  
20 right now. I don't care if the 706 board is complete, I want no  
21 requests, I want trial tomorrow." That is not what happened. I  
22 mean, the defense wants the 706 which is going to take time and also  
23 wants speedy trial. The government provided the Court with some

1 cases that say you cannot have it both ways. Do you have any case  
2 that support the fact that you can still request to demand a speedy  
3 trial while you are asking for things?

4 CDC[MR. COOMBS]: Yeah, and I think the, well the *Pyburn* case is  
5 probably the best case as an example of, you know, even if you are  
6 asking for something, and it there, it is not -- *Pyburn* is actually  
7 the trial counsel trying to obtain forensic evidence, but even though  
8 the defense is asking for something from the government, that is not  
9 then a ticket to take all of the time you want in order to respond  
10 back, and that is why we have that 30-day gap of waiting and not see  
11 any reason why the 706 board was not ordered to resume its work. The  
12 reason it was delayed was for the preliminary classification review.  
13 And, when that was done on 13 December, there was nothing holding up  
14 the board other than the fact that the government hadn't done  
15 anything at that point in order to ensure that the board was ready to  
16 go. And, that is the example being reactive instead of proactive.  
17 Proactive with them, "Hey look, let us get everything -- all of our  
18 ducks in a row so that as soon as we get our preliminary  
19 classification review back, if it is TS-SCI, no problem. We already  
20 have the clearances, we know where it is going to be. Drive on."  
21 And, that is what Colonel Coffman expected. So, this is not a  
22 situation where we are trying to get the government in a Catch-22  
23 where we are saying, "Give us these things," in this case, a 706

1 board, and yet, we want speedy trial. And that is not the situation  
2 here. This situation is seeing no activity on the 706 board for a  
3 month. That is when we submitted our request. And you see the same  
4 type of -- we repeated our demands for speedy trial is the government  
5 gets into its monthly excludable delay memorandums, and more than  
6 one, but particularly the 25 July memorandum. We clearly state,  
7 "Look, you know, we understand, we asked for the classification  
8 reviews in discovery." That is a burden on the government that they  
9 already have. That was something that they were going to be doing on  
10 their own. It is like us asking for *Brady*. But, that does not mean  
11 that we have all of the time the world then to respond to that and  
12 can take whatever amount of time you want. And, we pointed out in  
13 the 25 July response that at this point they had over a year to get  
14 the classification reviews done and they had not indicated why there  
15 was such a delay.

16 MJ: Mr. Coombs, I understand your position, is there any case  
17 law that has a similar fact scenario that supports that?

18 CDC[MR. COOMBS]: The speedy trial cases that are both in our  
19 motion and our reply and the government's response all deal with  
20 delays that we're talking in the manner of, like, you know, less than  
21 -- I think the longest one is 322 days that we are looking at. There  
22 is nothing in the ballpark of something like this case where we are  
23 now nearing day 1,000.

1 MJ: That is why I am asking you, I have not found anything that  
2 has a similar scenario.

3 CDC[MR. COOMBS]: No, and I think the reason why is, you know,  
4 we, to the extent you can, you frontload all of the stuff before  
5 referral and then you get -- actually before preferral if you are --  
6 if you have a guy in pretrial -- not in pretrial confinement, because  
7 you can take all the time you want. Here, I understand, the  
8 government had our client in pretrial confinement so their hand was  
9 forced and they needed to move quicker. But no, there is nothing  
10 that shows this amount of time and what would be reasonable and that  
11 is where I think the court, looking at this, would have to  
12 determined, "Is this reasonable?"

13 MJ: Okay.

14 CDC[MR. COOMBS]: So, those 53 days, we would say yes, it  
15 wouldn't be reasonable to allow that time to be excluded, because you  
16 would expect the government would have been proactive in ensuring  
17 that they have identified locations because really the whole time  
18 after 13 December, and when you look at their chronology, there is a  
19 break even and that of activity on getting the 706 board ginned up  
20 and started. But it really seem like they were just going to the  
21 board president saying, "You know, who are the members? Tell us who  
22 they are." You know, a week or so goes by, "Okay, we identified this  
23 person." "Okay, does he have the TS-SCI clearance?" "No he does

1 not." All that should have been done before. And the same thing  
2 with finding a location for their one meeting.

3           The other two time periods are relating to the 706 board.  
4 They are the two time periods that Doctor Sweda requested for an  
5 extension. And those are: 4 March to 18 March 2011, that is a 15-  
6 day time period; and, from 18 March to 22 April 2011, that is a 36-  
7 day time period. And in the first request, Doctor Sweda said the  
8 basis for it was difficulty in obtaining a meeting with PFC Manning  
9 as far as getting into a SCIF with him. That was the basis for why  
10 they needed the delay. They had done other stuff, all the testing  
11 and whatnot that they needed but they required the one time for the  
12 classified information. And it is important to note that the 706  
13 board did all of their work without being worried about classified  
14 information. The one time that they actually did anything with  
15 classified information was on 9 April. And, that was the one meeting  
16 at the SCIF in order to discuss the classified information that PFC  
17 Manning wanted to share with the board. And so, that was the basis  
18 for the need for the delay both for the 4 March to 18 March and also  
19 part of the 18 March, obviously, to 9 April.

20           MJ: Mr. Coombs, if memory serves me correct -- would you like  
21 to address the portion of the government's argument where they talk  
22 about you were wanting to talk to the accused before the board saw  
23 him?

1 CDC[MR. COOMBS]: And, you know, the e-mails, both my reply, I  
2 think, based on my position on this. But, the e-mails also, even in  
3 an objective looking at the e-mails, would see that the government's  
4 representation and its facts was not accurate.

5 MJ: What is accurate?

6 CDC[MR. COOMBS]: What was not accurate was that I did request  
7 an opportunity to speak with Manning ahead of time because I wanted  
8 to ensure that he knew what he could share or should share with the  
9 706 board. And, I wanted to see him in advance. And, there was a  
10 time period in which I am waiting for the government and I said,  
11 "Just give me an advanced notice, I can" -- I gave them days, and e-  
12 mail traffic shows this, when I am saying, "Look, all I need is an  
13 advanced notice and here are the days I can do it", and they were  
14 still trying to coordinate both the location and also with the board  
15 members when they wanted to do it. What happened then, and an  
16 objective reading of the e-mails shows, that the board selected a  
17 date, that government notified me of that date on a Monday and  
18 essentially what I needed to do was see my client within the next  
19 couple of days in order to see him in advance of the 706 board doing  
20 that. And, I informed them that, "Look, as I asked you several  
21 times, if you give me just at least a week's notice, I could plan  
22 accordingly for that." So, it is true that the defense wanted to  
23 speak with PFC Manning before the 706 board but that did not



1 necessitate a delay. It did necessitate moving things, and you will  
2 see from the e-mail traffic that a date that was selected for the  
3 board was pushed back to a later date.

4 MJ: Isn't that a delay?

5 CDC[MR. COOMBS]: From the standpoint of a delay from us, no, we  
6 would say. From the standpoint of the government, again, being not  
7 proactive but reactive, where I told them, "Just give me a day to see  
8 my client. I just want to see him in advance of the 706 board." And  
9 then, again what they do is kind of like the with the Article 13 e-  
10 mails, they drop it on me when there is not enough time to respond.  
11 And so, that would be the defense's position on those time periods.  
12 And, if these were not counted for 707 purposes because I could see  
13 where Doctor Sweda still is in the position of, he is doing a 706  
14 board. These are requirements for his 706 board. "Defense, you  
15 asked for this." So, I could still see this time not necessarily  
16 applying on 707 purposes but I certainly see in applying for Article  
17 10 purposes because again, it is another example of the government  
18 not being proactive, not being diligent. And, if they were diligent,  
19 this could have been done much earlier.

20 MJ: I guess I am confused with this time period. We have an e-  
21 mail saying, "Oh, board, take your time. This is an aspirational  
22 suspense." How do we get there?

1 CDC[MR. COOMBS]: And that is another thing that is taken out of  
2 context, my reply talks about that. The Convening Authority appoints  
3 the board initially and says, "You will complete your 706 board  
4 within four weeks." My response to that was to the board member,  
5 "Look, if you do that that is fine." That is aspirational. That was  
6 aspirational because if you need more than 4 weeks in order to make a  
7 thorough 706 then you take more than that time period. Our goal is  
8 that we get a complete and thorough report. Here, these delays are  
9 not in order to have a thorough report. These delays are based upon  
10 an inability to secure a SCIF location and then trouble with the  
11 board meeting as a board because conflicting schedules among the  
12 board members.

13 MJ: So, what is the defense's position on the onus on the  
14 president of the 706 board? It's just, you know, if you are  
15 appointed today, does everything have to be done tomorrow? I mean,  
16 what is reasonable?

17 CDC[MR. COOMBS]: Yeah, and see there is where certainly the  
18 government and defense will disagree, but I think that is where Your  
19 Honor comes into play of looking and saying, "Okay, what objectively  
20 is reasonable to expect?" And, my argument to the Court would be  
21 that what would be reasonable is that the government has taken the  
22 steps to identify the members, get their security clearances in  
23 advance of the preliminary classification review being completed.

1 They have identified a SCIF location in advance of that. If the  
2 board members, and you see e-mail from Doctor Sweda, "Saying we are  
3 having trouble identifying a Saturday or Sunday to meet with PFC  
4 Manning." The government then saying, "Okay, well a weekend was  
5 nice, we would have liked have done it on a weekend but we are going  
6 to knock it out during a weekday because the goal here is to get it  
7 done. And so, maybe that is not the best thing, maybe will be will  
8 do it after hours or early in the morning but, we will get it done on  
9 a weekday where we can get everybody."

10 But again, this is not being proactive and thinking how we  
11 can do things, it is just reactive.

12 MJ: Was there any contemporaneous -- I know you asked for  
13 speedy trial on 13th of January, was there any contemporaneous  
14 objection, saying, "Hey, set this thing up tomorrow night." Or ----

15 CDC[MR. COOMBS]: No, like the e-mail traffic, and there is e-  
16 mail in the discovery where I am saying -- suggesting, "Well let's  
17 have them meet on other days" or, you know, for us, for the 706, I do  
18 not think there is anything where we are saying, "Why isn't this  
19 happening?" My memory does not recall anything at this point but I  
20 do know that the monthly -- at this point monthly delays hadn't  
21 started. But, there is certainly e-mail traffic between myself and  
22 government trying to get updates on when we are going to be done  
23 because again, at this point, the defense's understanding would be a

1 as soon as the 706 was done we thought that a 32 was going to start  
2 up almost immediately. And so, I am confident there are e-mails  
3 where I am asking for updates just so I know for planning purposes  
4 when the 32 might happen. And that kind of leads us into the eight  
5 further time periods where we have, I guess, we believe should be  
6 applied against government. And this actually was a surprise to the  
7 defense that we would have this length of time but from 22 April to  
8 15 December of 2011, the government requests eight separate delays of  
9 the 32. And, I will just give you the time periods for the Court.

10 The first was 22 April to 12 May of 2011; and that is 17  
11 days. The second was 12 May to 17 June; that is 37 days. The third  
12 is 17 June to 5 July; that is 19 days. Then from 5 July to 10  
13 August; 37 days. From 10 August to 29 August; which is 20 days.  
14 From 29 August to 14 October; which is 47 days. From 14 October to  
15 16 November; which is 34 days. And then, from 16 November to 15  
16 December; which is 30 days.

17 And, each of those time periods, the government requested a  
18 delay of the 32. And in each of those time periods, the convening  
19 authority approved to delay over the defense's objection, in  
20 particular on 25 July we pointed out the fact that out had been over  
21 a year that the government had in order to complete classification  
22 reviews and what they had failed to do up to this point was  
23 articulate my they needed -- additional time is needed, what was

1 being done with the classification reviews, where they were in the  
2 process and we pointed that out in our objection, saying they have  
3 not given the Convening Authority enough specificity to indicate that  
4 the delay is warranted. And, in spite of that objection, the delay  
5 was approved.

6 So, you have really from, if you look at it in two separate  
7 time periods, from 27 May 2010, the date of arrest to 22 April 2011  
8 That is 333 days. And then, you have from 22 April 2011 the 15  
9 December date.

10 MJ: What you think is the appropriate start date, the 27th of  
11 May or the 28th of May? I thought I heard both.

12 CDC[MR. COOMBS]: You did, ma'am. And, the government in its  
13 motion and because it went to our benefit, we will go with that date,  
14 was 27 May. There is case law that, you know, if you are under  
15 certain conditions that qualify for arrest, that would then be  
16 arrest. We went with what was clearly the pretrial confinement. The  
17 government commences when PFC Manning was actually restricted to a  
18 CHU. So, because it went with our benefit, we will agree with the  
19 government.

20 MJ: All right.

21 CDC[MR. COOMBS]: So then, when you look at those time periods,  
22 there are a couple time periods in which it is clear that again if  
23 the government was proactive, instead of reactive, you could have

1 saved some of that time. And, the clearest example of that is the  
2 OPLAN B. The OPLAN B time period was from 16 to November to 15  
3 December 2011. And of course, only the government knew that it was  
4 getting close to getting all of its classification reviews and was  
5 getting close to actually starting the 32. And what I asked Colonel  
6 Coffman on the stand was, "Well, if you knew that, if you knew that  
7 you were getting close that time period, couldn't you have been  
8 initiated OPLAN B in a time period, you know, say 16 October? Had  
9 you started up the process on 16 October, then 16 November comes  
10 around when you say 'look, we have got all of our Constitution  
11 reviews now and we feel very comfortable with our pretrial prep for  
12 the 32, we are ready to go.'"

13 MJ: Did they have the classification reviews on 16th of  
14 October?

15 CDC[MR. COOMBS]: They started to get those classification  
16 reviews.

17 MJ: Did they know that they were going to get them?

18 CDC[MR. COOMBS]: That, I do not know, ma'am. And this -- but  
19 that is the hypothetical that I advanced to Colonel Coffman is if you  
20 knew you were getting close that time period, that you would in fact,  
21 at that point, be proactive, let's not have this 30-day delay. But,  
22 you know 16 November rolls around, the government has everything they  
23 need but they have got there OPLAN B that requires a 30-day break.

1 And so, from the defense's standpoint, that 30-day time period should  
2 count squarely against government. Again, they were proactive, there  
3 would be no need for that. We do have arraignment taking place on 23  
4 February and our 802 on 8 February. And, in our motion we advanced  
5 that that time period should count and again that is a -- at the time  
6 I am writing the motion, ma'am, I am forgetting ----

7 MJ: You weren't looking at your EDN?

8 CDC[MR. COOMBS]: Yeah, I was forgetting about the fact that we  
9 talked about that point. So, I just, on the record, indicate that  
10 obviously from 8 February forward, that should not count for the 707  
11 purposes.

12 So, when you look at the delays, certainly the monthly  
13 delays from 22 April forward under 707(c) in order to survive an  
14 abuse of discretion standard as judge Baker pointed out in *Lazauskas*,  
15 at 62 MJ 39, there must be some evidence that the Convening Authority  
16 exercised independent determination that there was in fact good cause  
17 for the delay. And here, Colonel Coffman did not do that. He didn't  
18 do anything close to an independent determination. Even on the stand  
19 he indicated that he trusted his trial counsel. He trusted the trial  
20 counsel and he trusted that other people were doing what they were  
21 supposed to be doing and when the trial counsel said, "We need this  
22 time to do the classification reviews", he said, "Okay." And, he  
23 signed that request. What was noticeably absent was the actual

1 questioning of, "Like, well are we at in the process? Now I am  
2 seeing in April when you first asked for this, what has been done in  
3 the 333 days previous to this 22 April date? " And then certainly,  
4 "After, you know, April, May, June, July and we get to July and I see  
5 defense making this big hoopla over you have now had over a year and  
6 you are not you know, getting me specifics, okay, well let's answer  
7 that. What are the specifics? Where are we at?" And you know, "How  
8 many more pages are being reviewed? How many people are working on  
9 it?" None of those questions were asked by Colonel Coffman.

10 MJ: Is it the defense's positions that when Colonel Coffman  
11 testified, if I remember correctly, that he basically relied on the  
12 trial counsel came with a written accountings each month, is it the  
13 defense's position that for due diligence the Special Court-Martial  
14 Convening Order should have personally gone to the agencies?

15 CDC[MR. COOMBS]: No. My position would be -- or the defense's  
16 position would be that the Convening Authority would had to have  
17 asked certain questions and gotten certain information from the trial  
18 counsel and the reason why that would be required is if you do not  
19 have that, then the 707(c) excludable delay becomes really a trial  
20 counsel delay that trial counsel can invoke any time they want.  
21 Because the practical realities of our system and being a product of  
22 it, I understand it, young captain becomes a trial counsel for a  
23 young line officer captain and that captain, that Judge Advocate



1 usually is the most independent person for that line officer to  
2 bounce things off of. And if it is done correctly, within short  
3 order, the line officer trusts the Judge Advocate as one of their  
4 best sources of information. And that young captain, that line  
5 officer then becomes, you know, staff officer, deals with Judge  
6 Advocates, becomes a battalion commander, a brigade commander and now  
7 you get to Colonel Coffman level and hopefully he has had an  
8 experience where he has had great experiences with Judge Advocates  
9 any trust implicitly their advice. And that is like convening  
10 authorities always go with the Staff Judge Advocate for the most  
11 part. And I understand that. But here, you cannot have it to where  
12 the trial counsel would just put a cut-and-paste job, and these were  
13 cut-and-paste jobs every month essentially, in front of the convening  
14 authority and say, you know, "Sign this." And the Convening  
15 Authority taking anywhere from 1e minute to I think he said up to 15  
16 minutes sometimes before he signs it. Does he need to contact the  
17 OCAs, no. But, he does need to inform himself and asked certain  
18 questions. And that is why went through those questions to see, "Did  
19 you ever ask these?" And the answer was, "No." And even the Court  
20 asked, "Well, would there come a time that you would say to yourself,  
21 'you know what, I am troubled by this.'" And he said, "I am sure  
22 maybe, but it did not come yet." So, there was not a time at this

1 point that he was troubled between 22 April of 2011 to 15 December  
2 2011.

3 MJ: What is the defense's position of my review of the special  
4 court-martial convening authority's granting of the delays? An abuse  
5 of discretion or *de novo*?

6 CDC[MR. COOMBS]: It is abuse of discretion, ma'am. And so, if  
7 it is within his discretion, and I am going off of that because that  
8 would be the appellate review. And that is actually very good  
9 question the more I think about it. Because it should be abuse of  
10 discretion though, I would think.

11 MJ: I believe that is what the case law says.

12 CDC[MR. COOMBS]: Yes, ma'am. And, the reason why, obviously,  
13 is he, under 707(c), is given the authority to do that. Much like if  
14 Your Honor grants a delay, that is going to be reviewed for abuse of  
15 discretion. So, I think at this point then when you have that  
16 discretion part this is where Judge Baker's line becomes important  
17 that you have to have some evidence of independent determination.  
18 And, once you have that, if there is independent determination, then  
19 I think that is where you get the actual discretion aspect. But, as  
20 he said, he wasn't troubled by the passage of time, he was not asking  
21 any of the questions that I went through with him. He never asked  
22 for specific updates on what was being done precisely and was still  
23 remaining and how much longer it would take. And, at least in the

1 defense's argument, he ultimately was just a rubber stamp for  
2 whatever is placed in front of him. And, when you do that, 707(c)  
3 ceases to mean much if that is all it is that the trial counsel  
4 saying, "We are not ready yet. For whatever reason, we need  
5 additional time and we do not want it to count against us." It is  
6 also clear at least from all the documentation, I know the trial  
7 counsel has advanced other reasons for the delay, but the primary  
8 reasons for these delays are the classification reviews and the need  
9 to obtain them. As we ----

10 MJ: What about the forensic evidence the government was talking  
11 about?

12 CDC[MR. COOMBS]: Right, the government also said, you know, and  
13 I think this was in our -- one of our motion's argument, but they  
14 advanced it here today as well, that they would not have gone forward  
15 without all of the forensic evidence being complete. And, that is, I  
16 guess, not going for the 32. I cannot think of a case other than  
17 this one, where I have ever gone to a 32 and had a completed forensic  
18 report; never. Or, a CID investigation for that matter, ever. It is  
19 a practical reality of our systems that the 32, much like the grand  
20 jury in federal system, gets done early on in the process. And, the  
21 completed CID report or the completed forensics usually happens after  
22 the 32. So, I mean, I am sure the government would like to have

1 waited until the completed forensic report, but that is not a luxury  
2 they get, certainly not when my client is in pretrial confinement.

3 MJ: Well, that is what I am looking at now. The government, if  
4 they go to in Article 32 and they do not have the evidence, that the  
5 recommendation might be, "Let's dismiss all of the charges and send  
6 the accused home." I mean, where is that line?

7 CDC[MR. COOMBS]: Sure. Right. And I would agree with that,  
8 that again, this -- you go back to when they put him in pretrial  
9 confinement they were put under a speedy trial clock gun,  
10 essentially. So, ideally, yeah, they would not have wanted that.  
11 But, having all the completed evidence and then having evidence,  
12 certainly the standard that you would need "Some evidence" at the 32.  
13 Completely different when the trial counsel is saying, "Hey, very,  
14 very high standard", they are talking, proved beyond a reasonable  
15 doubt at trial, they are not talking about 32, which is, "Some  
16 evidence".

17 When you look at even their own chronology, it shows that  
18 they were getting completed forensic -- not completed, but forensic  
19 reports. And, the way that it was is they had interim reports that  
20 are essentially said the exact same thing as the final report but  
21 they just were not through the approval process. So, could the  
22 government have gone forward much earlier? Yes they could have, but  
23 they chose not to. And the main reason they chose not to was wanting

1 to wait for these classification reviews. And, they have advanced  
2 that they need these in order to invoke the privilege at the 32 to  
3 demonstrate that the information was properly classified because  
4 charged it as classified or to argue and allow for a closed session.  
5 All of those purposes are worthwhile purposes for the classification  
6 review, but you do not need a classification review in order to  
7 achieve any of those.

8 MJ: How would they have proven the evidence was classified?

9 CDC[MR. COOMBS]: Quite easily, just bringing in anybody from  
10 the agency to say, "This was on SIPRNET. It was classified." The  
11 Court even said -- and there is some of the documentation where it is  
12 marked right on it like Department of State cables. It is marked  
13 right on it whether or not it is classified.

14 MJ: Did anybody from the defense team go to the government and  
15 say, "We do not want to wait for these anymore, we will stipulate  
16 that they are classified"?

17 CDC[MR. COOMBS]: No. No, Your Honor. And, I think that was  
18 ever even, like, broached as a conversation. So, the government  
19 certainly could have gone forward to the 32 and this again is very  
20 similar to the *Pyburn* case where the trial counsel really wants the  
21 forensics but you do not need it necessarily because you have got a  
22 witness who can identify the person. In that case it was a rape case  
23 where because of being assaulted she was beaten unconscious and could

1 not testify to actual sexual intercourse but could identify the  
2 accused as her assailant. And there, the court said that had you had  
3 other evidence you could have gone forward. And, to show that the  
4 government did not need to classification reviews, even the  
5 government invoked certain provisions under 505(c). The Convening  
6 Authority, prior to the classification reviews, invoked 505(c) in  
7 order to put in place protective orders on how certain information  
8 will be held. And to show that you could get a classification  
9 determination from an OCA rather quickly, if the Court looks at  
10 Appellate Exhibit 449, that is the classified OGA response, it shows  
11 the OGA conducted what they termed as kind of a preliminary  
12 classification review and that took only 6 days. And, that was done  
13 I believe on 24th of March of 2011, where they indicated what the  
14 classification level was of the information that they were going to  
15 be reviewing. But, there could have been a litany of other ways of  
16 showing the classification level, like where he was from, they could  
17 have even brought somebody in from my client's unit to say, "Yeah,  
18 all the information you are charging there comes from the SIPRNET and  
19 if it is on SIPRNET, we treated it as classified. That will be "some  
20 evidence". Now, whether or not that would ultimately be proof beyond  
21 a reasonable doubt is something different. And also again, the  
22 practical realities of our system, and I recognize the inconsistency,  
23 at least in this argument, as the defense counsel I always argue that

1 the 32 should be a higher standard, that we need more evidence that  
2 the 32 and that the government is trying to do it on the cheap and  
3 just get through you know, this stumbling roadblock, to move on the  
4 court-martial. I recognize that. But certainly here, this was the  
5 government perfecting its case before the 32.

6 MJ: Well, if they had gone in without that evidence, wouldn't  
7 that leave them open to you coming in as a very good defense counsel  
8 and saying, "Hey, they have gone through all the I's and dotted their  
9 T's, there is no evidence that this is classified so you should  
10 recommend something less than you otherwise would with this evidence?

11 CDC[MR. COOMBS]: Sure, for example, had just been that no  
12 classification review was done but they had somebody from the OCA  
13 come, I can make an argument. That is correct. And it would all, I  
14 guess, would depend on what the IO recommended, recognizing that it  
15 is a recommendation. And again, the practical reality of our system  
16 that the IO's recommendation, while important does not control what  
17 the Convening Authority does. And if the Staff Judge Advocate, who  
18 has the ear the Convening Authority is recommending one thing, a  
19 betting man would be safe in going with what is going to happen. So  
20 yes, it would open that up. And also would open up, to be honest, a  
21 later argument to the Court of a defective 32, certainly. But again,  
22 the 32, and I guess the response I have gotten done that is "You're  
23 guaranteed that 32 but not a perfect 32. And that would have been

1 probably that the response in this instance. So, again the  
2 government chose to wait and chose to delay this in order to have all  
3 of the information that it wanted for the actual 32. And, they kept  
4 on parroting the same justification that the Convening Authority had  
5 good cause to exclude this period of time and did so for only for as  
6 long as necessary. Well, one of the things they point to and what  
7 they have said here as well is that it is a complex case that  
8 involved a lot of information. And, what the defense would argue is  
9 instructive on this *United States v. Duncan*, 34 MJ 1232.

10 MJ: Can I ask both of you the same thing that I asked them, can  
11 I get a list of the cites?

12 DC: I already wrote it down, yes, ma'am.

13 MJ: I will go through and highlight the ones I do not have and  
14 you all can get them for me.

15 CDC[MR. COOMBS]: Yes, ma'am. So, in *United States v. Duncan*,  
16 the court rejected out of hand the argument that it was a complex  
17 nature of the case or the fact that the case was highly classified or  
18 even the fact that the accused had filed a collateral civil suit in  
19 federal court as being a basis for good cause delay under 707. And,  
20 the main reason is the court said that the government failed to  
21 establish a connection, a causal connection or a nexus, if you will,  
22 between the delay that they were asking an event or pointing to.  
23 And, that is the exact scenario that we have here today. The



1 government has failed to make that connection and the reason why is  
2 the government and Colonel Coffman in granting this delay never  
3 bothered to answer straightforward questions of, "What was taking so  
4 long? What were the OCAs doing on a daily, weekly basis; monthly  
5 basis? How many people were working on it? What they were looking  
6 at? How often they were working on it? How many documents were they  
7 reviewing? How many more documents do they have left?" All of the  
8 questions that if you had those answers coming in, certainly if they  
9 were in the monthly delays, it would show not only progress but it  
10 would show why that amount of time was needed which I think the Court  
11 brought up and is a good question of, "Well, like, how long does a  
12 classification review take? You know, is it 6 weeks appropriate, the  
13 standard, or is 6 months or is a year?" And the answers to some of  
14 these questions would have been easy to point to if you had the  
15 government asking, of the OCAs, "What were you doing?", instead of  
16 just simply giving them, again, a cut-and-paste request to complete  
17 their classification review and then giving them a new deadline,  
18 because each of their requests, with the exception of the first one  
19 that did not have speedy trial paragraph, but each of the subsequent  
20 ones to the OCAs was essentially the same memo with a different  
21 deadline.

1 MJ: What is the defense's position with respect to be diligent  
2 under, reasonably diligent under Article 10? What else should the  
3 government have done?

4 CDC[MR. COOMBS]: The defense would say that some of these  
5 questions of, like, going to the OCAs, saying, "Okay -- and certainly  
6 when you are talking about and, I know that the government, I am  
7 going to say going to say that they are dealing with themselves,  
8 which they are. But, I recognize that one agency does not  
9 necessarily have to play nice with another agency. But, what you  
10 would expect, certainly within the Department of Defense where you  
11 can in fact use the chain of command to get something done, is to  
12 say, "Okay, where are you at, exactly, in this process? How many  
13 people are working on it? How often are they working on it? When do  
14 you expect to be done? We gave you, on 18 March, we gave you until  
15 31 March, you have missed that deadline. In the military you do not  
16 miss deadlines unless you have a very good reason. So, what is your  
17 reason?" Those type of inquiries were never done and a diligent  
18 trial counsel should have done this things.

19 MJ: Are you suggesting that a trial counsel can tell a  
20 commander over at CENTCOM that your deadline is "X"?

21 CDC[MR. COOMBS]: With a little help. And, that help will  
22 come from Colonel Coffman and then up the chain. I mean, they  
23 ultimately have an ear of a three star and that is where you would

1 get your help. But that did not happen. So again, you get Colonel  
2 Coffman approving these delays month after month with none of these  
3 questions being asked and from our position then, you do not have an  
4 independent discretion being exhibited. And that you do have then a  
5 violation of the R.C.M. 707 clock as long as you knock out even one  
6 of these additional time periods. Then, under R.C.M. 707, if the  
7 court would find a 707 violation, then the question is, "Is it  
8 dismissal with, or without prejudice"? And, the circumstances that  
9 would lead to dismissal with prejudice, at least what the factors the  
10 Court should consider, are the seriousness of the offenses, the facts  
11 and circumstances that led to the dismissal, the impact of a re-  
12 prosecution on the administration of justice and the prejudice to the  
13 accused. And again, the defense would concede that these are serious  
14 charges and that there is a justice interest in ensuring that the  
15 charges, or the offense, go forward. But, in this case, given the  
16 amount of time, there is extreme prejudice to PFC Manning from a  
17 denial of his speedy trial. And perhaps the best example of that has  
18 come through what we have seen both in the speedy trial but also in  
19 the Article 13 motion where you ask questions of witnesses and they  
20 say, "I do not know, I do not recall. I do not remember. It has  
21 been so long." And, that is really why we have speedy trial in the  
22 military, to ensure that justice is done in a swift manner but also,  
23 obviously, in a fair manner. But, there are no winners when justice

1 is delayed and in this case it has been delayed a significant period  
2 of time and, the majority of the time was due to the time period  
3 between 22 April and 16 December 2011.

4 MJ: Mr. Coombs, have you seen any other UCMJ cases or military  
5 cases that are similar at all to this case involving the volume of  
6 information, the volume of classified information and the complexity?

7 CDC[MR. COOMBS]: Well, there are other cases where, the names  
8 are escaping me, they are in our initial briefs where we do have  
9 complex cases -- and, we take issue with the government's citing of  
10 several cases in their brief -- *Longhofer* and *Matli* case for complex  
11 cases, meaning you get a lot of time. *Longhofer* is at 29 MJ 22, and  
12 there, the total elapsed time was 322 days. In the *Matli* case it was  
13 68 days.

14 MJ: How do you spell that?

15 CDC[MR. COOMBS]: M-A T-L I.

16 MJ: Okay.

17 CDC[MR. COOMBS]: And, the cite for that is 2003 Westlaw,  
18 826023. And then, the government cites several federal cases which  
19 obviously Article 10 is more stringent than the Sixth Amendment but I  
20 understand why they might cite them just for persuasive authority but  
21 each of those, you are talking about a much lower period of time.  
22 What is unclear I guess is the comparison between the amount of time

1 and amount of information that you are talking about and what might  
2 be viewed as complex litigation.

3 MJ: Well, I guess I am looking at this with, from what the  
4 Court has seen is there has not been, at least in the military  
5 justice system, cases like this are not routinely tried. I don't  
6 know if either side has done a comparison with looking at some of the  
7 federal cases that have tried some of these espionage-type cases and  
8 how long they take?

9 CDC[MR. COOMBS]: Yeah, I have not but I would probably say just  
10 from -- not looking at it through this light but just reading some of  
11 this case is that the day -- the federal cases would be longer just  
12 because it seems that lengthy periods of time are tolerated for  
13 whatever reason in federal court than it would be in a military  
14 court.

15 MJ: Yeah, they do not have Article 10, I agree with that.

16 CDC[MR. COOMBS]: Right, Your Honor. So, that is why I would  
17 say that may be persuasive at some level but I do not think there is  
18 anything approaching our case in the military courts.

19 MJ: Okay.

20 CDC[MR. COOMBS]: And that leads me to the Article 10 discussion  
21 now so I would like to transition to that. So, if the Court has any  
22 questions on the 707 that you have not asked?

23 MJ: I think I have asked them all.

1 CDC[MR. COOMBS]: All right, ma'am. Not that I do not want you  
2 to ask them.

3 So, the Article 10, here we would say that PFC Manning's  
4 Article 10 rights were also violated. And, as of today, PFC Manning  
5 has been in pretrial confinement for 964 days. And, at least the  
6 defense's position is that there are two main reasons for that. One,  
7 the defense believes that the government has, in fact, been dragging  
8 its feet from very early on in this case. And, that is by wanting to  
9 perfect its case before it went forward in the process. And two,  
10 that we have had a significant amount of delay because of the  
11 government operating under a misunderstanding of some bedrock  
12 discovery principles and obligations.

13 Under Article 10, the inquiry is that, you know, the  
14 government must show that they have been moving forward diligently  
15 the entire time period from day 1 to the date of the actual start of  
16 trial. So in kind of plain terms we ask, you know, "Has the  
17 government been foot dragging on the case on a given issue? And if  
18 so, has that been unreasonable?" And, to assess whether or not they  
19 have showed diligence there is a four-part test. And what I would  
20 like to do is structure my argument by that test.

21 Now this procedural framework as the court stated in  
22 *Thompson* which is at 68 MJ and the pin cite is actually at 313. This  
23 four-part test should be treated just as a procedural framework as an

1 integrated process as opposed to a, you have to satisfy each one of  
2 these in order to show an Article 10. But, it is instructive because  
3 it is a test so I will look at that. The first is the length of the  
4 delay factor. And here it seems certainly in their written motion to  
5 government does not concede this. And the defense may have  
6 misunderstood the government but it seems like they conceded it in  
7 oral argument and then they proceeded to argue it again that just the  
8 amount of time, the 964 days is facially unreasonable.

9 MJ: I thought I heard a concession as well. Well, facially  
10 unreasonable, well, under *Schubert* it triggered the additional  
11 factors.

12 TC[MAJ FEIN]: Yes ma'am, it is just a trigger, it doesn't mean  
13 it is necessarily unreasonable.

14 CDC[MR. COOMBS]: Right. And so, I won't spend any more time  
15 arguing the length of delay factor because at least that gets you  
16 into the rest of the factors. So then if you look at the second  
17 factor which is the reasons for the delay, and here the case law says  
18 what you look at is has the government spent too long kind of in a  
19 waiting posture. And the cases instruct the court not to accept as  
20 legitimate the government's justifications if those justifications  
21 simply reflect the realities of the military justice practice. And  
22 one of the realities of our practice is there is a requirement to

1 coordinate not only with other entities within the government but  
2 also with civilian entities. That is the reality of our practice.

3 MJ: To this extent, was this done in this case?

4 CDC[MR. COOMBS]: To this extent, and I will go through each of  
5 the OCAs, but certainly, yes, this case involves more -- it is not  
6 your straightforward larceny case. But also some of the complexities  
7 in this case are driven by how the government chose to charge the  
8 case. And, it would have been my personal wish, but I could have  
9 easily envisioned a much easier, straightforward charge sheet.

10 MJ: But how does that impact Article 10? Has any Article 10  
11 case come back and said, "Look, you overcharged the case therefore  
12 the things that you did to prove your case now are not reasonable?"

13 CDC[MR. COOMBS]: No, because even if you overcharged the case  
14 and then he showed reasonable diligence as to how you went about, I  
15 guess, getting your case together, the remedy for that would be a  
16 motion to the court. So no, there would not be any cases that would  
17 say that in and of itself is problematic. But here the reasons for  
18 delay given by the government, again, go back to our main reason was  
19 the need for the classification reviews. It took the government  
20 basically 568 days from 27 May 2010 to 16 December 2011 to be ready  
21 for the Article 32 hearing.

22 MJ: How many days is that?

23 CDC[MR. COOMBS]: 568 days, ma'am.



1 MJ: Okay.

2 CDC[MR. COOMBS]: And, even if the Court upholds the  
3 government's conduct under 707 based upon the excludable delays they  
4 have to show they were diligent this entire time period, the entire  
5 560 days. And the various excuses that the government has given as  
6 to why they were, you know, taking that amount of time, and granted,  
7 they might have been doing something on each given day but the main  
8 reason that you had that length of delay was the need for these  
9 classification reviews. And, one thing that Article 10 does not  
10 allow is for the government to just sit back and idly wait for  
11 another agency to complete a task.

12 MJ: What is the defense's position with respect to simultaneous  
13 defense requests for things that were going on at the same time?

14 CDC[MR. COOMBS]: I think at that point -- I guess taking it out  
15 from this case for a moment, if the government shows that say on  
16 every day they are sending e-mails or making some calls on a given  
17 issue but they still take 6 months to bring a larceny case to trial  
18 after preferral you are going to have a problem with that even though  
19 they can show every day they did something. Much like in this case,  
20 every day I am sure the government can show some activity in trying  
21 to do something or even responding to an issue from the defense but  
22 none of those things would have resulted in a 32 being delayed. So,  
23 us asking for certain things, if the government on 22 April after the

1 706 was done said, "Let us go." The other requests, the discovery  
2 issues or whatnot would have been issues that now would have been  
3 addressed to the court. So, that does not -- just because we asked  
4 for certain things does not give them the ability to say, "Okay that  
5 is why this time should be excluded or why we were diligent."  
6 Because, again, even though they have tried to articulate other basis  
7 for it, it really was the classification reviews that necessitated  
8 the 22 April to 16 December delay.

9 MJ: I am going to ask you the same question I asked them. Is  
10 there any case that I can look to or in the case authority that says,  
11 "Okay, if a case has four components and government is really busy  
12 and two of them during this period but has not worked on the other  
13 two that that is -- you have to work on all four every day." I am  
14 exaggerating, but you know what I mean?

15 CDC[MR. COOMBS]: I do. I do not know any case, no ma'am. And,  
16 I think that is why I would say that again this is where just kind of  
17 looking to see -- and certainly I think it is from the monthly  
18 excludable delay memorandum that give you the best indication of  
19 this, why did we have this delay? What is the reason for it? And,  
20 it is the classification reviews. The other issues, like I said, if  
21 you take the classification reviews out of it, if all of the OCAs had  
22 their start on 23 April, I am confident that we would have gone  
23 forward at the 32. I do not think the government would have said,

1 "Wait, wait we do not have the completed forensic report, the  
2 finalize one from CID." They had what they believed they needed,  
3 apparently the classification reviews, on 22 April they would have  
4 pushed forward. All those issues that the point of things have been  
5 done, e-mails back and forth, that still would have happened it just  
6 what happened post-32. And then, obviously post-32 they would have  
7 had a time period to get to the court and again, from a defense  
8 counsel standpoint, one of the happiest days is post 32 because now  
9 once you get it into a judge's hand, now you are not having to deal  
10 with the government, you have an independent arbiter that you can ask  
11 to go to.

12 MJ: But realistically looking at this, assume your 706 board is  
13 done on the 22nd of April and I am going out on a limb here but I  
14 doubt that the defense would have said, "Okay, I am ready to go to 32  
15 on 23 April." You know, you get a reasonable time to look at the  
16 report, digest it and then you have OPLAN B that has to go into  
17 effect so your looking, even if the report comes out at 22 April,  
18 you're looking at, at the earliest, an Article 32 around 1 June.

19 Would that be fair?

20 CDC[MR. COOMBS]: Well, the reports that were coming out on 22  
21 April are just the classification reviews.

22 MJ: I thought that's when the 706 board was being completed  
23 about that time.

1 CDC[MR. COOMBS]: No, yes ma'am. But I am saying I was just  
2 running with your hypothetical. If the 706 board, when it was done,  
3 and we look at it, if at the same time all of the classification  
4 reviews came in, I don't think we would have asked for a delay. And,  
5 the reason why is because the classification reviews were all 2 to 3  
6 pages. The one exception is the Department of State which is 51  
7 pages. But, none of these were *War and Peace* novels. They were  
8 really short. And, the 706 board, at least the results were not a  
9 surprise to the defense because we did have our own expert sitting  
10 through and so he was keeping us updated on things. So, I don't know  
11 if there would have been a delay, I can tell you that usually and --  
12 I will concede that normally, in the standard practice, the  
13 government prefers, says they are ready for the 32 on day three and  
14 the defense says, "Wait, wait, we need to look at things." But, at  
15 that point we have had over a year so we probably just would have  
16 gone forward.

17 MJ: Okay.

18 CDC[MR. COOMBS]: So, for purposes of this motion, the key OCAs  
19 are CENTCOM, SOUTHCOM, Department of State, INSCOM and OGA. Now, in  
20 the interrogatory responses, the government acknowledges and in other  
21 discovery they acknowledge that on 18 March is when they submitted  
22 their formal request to complete a classification review and in that,  
23 they asked for them to finalize it and they gave them until 31 March

1 to do that. What the government does not do is explain why it took  
2 295 days in order to request that formally in writing. And, for the  
3 most part the OCAs and their interrogatory responses failed to answer  
4 why it took so long for them to complete it. Because what happened  
5 then is you get 18 March when the government asks for them to  
6 finalize it and many of them are not finalized until early November  
7 2011, so almost 230-some days later. And, you see the government  
8 sending their kind of cut-and-paste request in subsequent months to  
9 finalize your review with a new deadline which they miss. But, there  
10 is no -- again, there is no justification for why that time period  
11 continues to go by or why they are missing these deadlines. And when  
12 you get the end product, again, you see that is 2 to 3 pages. Almost  
13 all of them were 2 to 3 pages. The exception is OGA-1, it is nine  
14 pages and the Department of State is 51 pages. So, these are, again,  
15 very short and at some point, especially with interrogatories, when  
16 you get the opportunity to indicate precisely what you are doing and  
17 why there was a delay and you fail to do that, that becomes your  
18 answer. The answer is, "We do not have an excuse for that amount of  
19 time." And, when you look at the interrogatory responses, there are  
20 some facts that the defense would like to highlight the Court and  
21 these can be found in Appellate Exhibit 448 and 449. And, I will  
22 just go by OCA.

1           The first is CENTCOM. Now, this can be found, ma'am, on  
2 Page 1, the answer can be found in question two and three. And there  
3 CENTCOM states that it conducts approximately 300 classification  
4 reviews on average in a yearly basis. And, those reviews consist of  
5 anywhere from a few pages to tens of thousands of pages. The trial  
6 counsel first approached CENTCOM about a classification review on 20  
7 October 2010 and that can be found on Page 3, Question 13. The trial  
8 counsel first asked CENTCOM to complete a classification review on 18  
9 March 2011, at least formally, and that can be found on Page 3,  
10 Question 16. And again, the suspense given by the trial counsel was  
11 31 March. CENTCOM says it began its classification review process  
12 after its compromised documents were approved for use for criminal  
13 prosecution and once the prosecution determined which documents they  
14 were charging; and this can be found on Page 4, Question 22. CENTCOM  
15 says it reviewed approximately 100 documents for the classification  
16 review, Page 5, Question 27. And then, CENTCOM provided a list of  
17 what they termed as action officers and the dates that they were  
18 asked to work on the classification review. And, the earliest date  
19 provided by CENTCOM was 21 September 2010. And, the latest date  
20 provided was 31 October 2011. This can be found on Page 6, Question  
21 28. CENTCOM admits that it did not require weekly, monthly -- excuse  
22 me, daily, weekly or monthly updates on the progress from those  
23 working on the classification reviews; this is Page 7, Questions 35

1 through 44. And ultimately, CENTCOM completed two classification  
2 reviews, the first dated 15 February 2011; that was two pages in  
3 length. And the second was dated 21 October 2011, and that was three  
4 pages in length along with attachments. That is Page 16, Questions  
5 81 and 82.

6           SOUTHCOM: SOUTHCOM also says that it does not track the  
7 number of classification review that they conduct on a yearly basis.  
8 It stated that the classification review in this case was handled as  
9 part and course of a daily operations and was staffed, keeping in  
10 mind that the primary function and purpose was accomplishment of the  
11 daily mission. In their interrogatory response, SOUTHCOM stated that  
12 while the classification review is considered important, it was one  
13 of numerous important tasks being handled; that is Page 2 and 3,  
14 Question 5. SOUTHCOM also did not obtain any daily, weekly or  
15 monthly updates on progress and did not track how many hours was  
16 being worked on the classification reviews or even how often it was  
17 being worked on; that is Pages 8 through 10, Questions 34 through 46.  
18 SOUTHCOM completed an initial classification review in February of  
19 2011 but for some reason that was deemed insufficient; that was Page  
20 11, Question 52. Their initial review was of four documents and it  
21 was 11 pages in length; that is Page 4 and it is entitled,  
22 "amplification to response." SOUTHCOM began its second  
23 classification review after 18 March 2011 and conducted a

1 classification review now on five documents consisting of 22 pages;  
2 that is Page 8, Question 27. And then, SOUTHCOM completed its second  
3 classification review on 4 November 2011, it was four pages in  
4 length; that is Page 16, Question 81.

5           The next agency is the Department of State. The Department  
6 of State indicates that their classification reviews were undertaken  
7 by retired foreign service officers; that is Page 1, Question 1. Now  
8 as a retired foreign service officer at the Department of State  
9 stated that these individuals worked less than 40 hours per week and  
10 their scheduling and the nature of the department's review process  
11 makes it difficult to say precisely what percentage of time was  
12 devoted to any particular assignment; Pages 11 through 12, Question  
13 38. The Department of State did not require daily, weekly or monthly  
14 updates on the progress in completing the classification reviews;  
15 Page 11, Questions 34 to 36. And, the Department of State did not  
16 keep track of the number of hours devoted by employees to one task,  
17 project versus another; Page 11, Question 38. Department of State  
18 acknowledges that reviewers did not work every day on the  
19 classification review and did not work on weekends or holidays on the  
20 classification review; Page 12, Questions 39 through 41. The  
21 Department of State does provide estimates as to the number of hours,  
22 however, each individual spent on classification review in those our  
23 estimates range from 12 to at least 32 hours in total; Page 13,



1 Question 44. Department of State documents the number of individuals  
2 that worked on the classification review and the time period that  
3 they worked and the period that they document, a person started at  
4 the earliest on 9 June of 2011 and the latest was 30 October 2011 for  
5 the charged documents. Their review and the report was being  
6 apparently prepared currently, thus the Department of State says that  
7 it took approximately 4 months to complete the classification review,  
8 and that is from June of 2011 through October of 2011; Page 14,  
9 Question 46. The Department of State completed its classification  
10 review on 31 October 2011, it was 51 pages in length; that is Page  
11 21, Questions 81 through 82. Department of State believes that the  
12 trial counsel -- now this is some background information, first  
13 discussed the need for a classification review in August of 2010.  
14 And they say in November of 2010, the Department of State and the  
15 trial counsel met to discuss the first steps in more concrete terms;  
16 that is Page 5, Question 13. And apparently after this November  
17 meeting, the Department of State stated that its understanding was  
18 that it would do an initial sort of the cables and that should be  
19 completed by the end of November 2010; that is Page 5, Question 16.  
20 And after completing this initial sort, the Department of State met  
21 with the trial counsel again in early December of 2010 and at that  
22 meeting the trial counsel requested that by the end of January of  
23 2011 the Department of State, one, authorize the remaining cables to

1 be used as charged documents in a classified setting; and two,  
2 prepare redacted versions of the cables that could be used in an open  
3 hearing; that is Page 5, Question 16. During the 2010 timeframe, the  
4 Department of State stated that it agreed with the trial counsel that  
5 the Department of State would not yet begin its formal classification  
6 review; and that is Page 6, Question 16. And then, on 18 March 2011,  
7 the trial counsel sent its first written request for a formal  
8 classification review to be completed by 31 March; that is Page 6,  
9 Question 16. The requested classification review was for 125 cables;  
10 Page 6, Question 18. The Department of State says that it did its  
11 initial sort and then in fact began its formal classification review  
12 of now 126 cables on 9 June 2011, and apparently, the trial counsel  
13 had added one additional cable that they wanted a classification  
14 review done on. So, from 9 June 2011 to 31 October, they were doing  
15 their classification review and ultimately, apparently, some of those  
16 cables fell out because of the initial 126 that they reviewed, the  
17 trial counsel decided to use 117 as charging documents; that is Page  
18 8, Question 27. On 14 March 2011, the trial counsel requested  
19 approval to disclose classified information to the defense and the  
20 Department of State approve that request on 29 March 2011; that is  
21 Page 22 through 23, Questions 88 and 97. And finally, the Department  
22 of State gave approval to the trial counsel to use the charged cables  
23 on 9 February 2011 and approval for the additional cables that were

1 identified by the trial counsel on 23 February 2011, that is Page 26,  
2 Question 110(e).

3           The next OCA is INSCOM. INSCOM did not track the number of  
4 classification reviews that it conducted on an annual basis nor the  
5 hours spent on classification reviews; that is Pages 2 through 3,  
6 Questions 2 through 6. According to INSCOM, the trial counsel began  
7 communicating with them in March of 2011; that is Page 4, Question 9.  
8 And the first time that the trial counsel approached INSCOM  
9 concerning conducting a classification review was on 9 March 2011;  
10 Page 4, Question 13. The first written request for classification  
11 review was again on 18 March; Page 5, Question 17. And, the trial  
12 counsel requested the review of four documents, one of them would be  
13 a charge to document of the four; that is Page 5, Question 18. On 28  
14 March 2011, INSCOM forwarded the request to their subject matter  
15 expert which was Mr. Cassius Hall, however, at that point, they  
16 realize that Mr. Hall was a defense appointed expert. So, instead of  
17 giving to Mr. Hall, they gave it to another individual within INSCOM;  
18 that is Page 6, Question 22 and also Page 16, Question 73. Like the  
19 other OCAs, INSCOM did not require weekly -- excuse me, daily, weekly  
20 or monthly updates on the progress of the classification reviews nor  
21 did they require any sort of accounting of hours spent; question--  
22 excuse me, Page 9, Questions 33 through 35. And, when INSCOM began  
23 their work, they determined that the document was not properly

1 marked, the charged documentary they were looking at. And, due to  
2 the fact that it was not properly marked, they sent it back to the  
3 author in order for that to be correctly identified as far as the  
4 original source of the information. I believe this is the charged  
5 document in Specification 15 of Charge II; this is Page 10, Question  
6 38. INSCOM began their written classification review on 7 September  
7 2011 and completed their classification review on 8 September 2011  
8 that is Page 17, Question 82 through 83. And, apparently at that  
9 time INSCOM determined that the information is not within the OCA  
10 authority of INSCOM and that that it required review of another  
11 agency and that is OGA, the last OCA; and that is Page 18, Question  
12 85. So, OGA, there interrogatory response is Appellate Exhibit 449.  
13 And, I just want to highlight just a couple of dates from that. They  
14 begin their classification review ----

15 MJ: This is INSCOM, or ----

16 CDC[MR. COOMBS]: This is OGA, ma'am.

17 MJ: Got it.

18 CDC[MR. COOMBS]: They begin their classification review on 18  
19 March 2011. And, as I alluded to earlier, they provided a  
20 preliminary classification review that confirmed the classification  
21 level the documents on 24 March 2011 so, basically 6 days later they  
22 can do that. They consented to the government disclosing information  
23 to the defense on that same day, 24 March 2011. And ultimately, they

1 conducted a review of three documents, the review of those three  
2 documents apparently took until 8 November 2011. Many of the  
3 responses that would, I guess, illuminate why there was so, the OGA  
4 claimed either attorney work product privilege or deliberative  
5 process or attorney-client privilege to those questions, so they did  
6 not respond.

7           So, there is really no documentation from either the trial  
8 counsel the Convening Authority inquiring into what is OCAs were  
9 doing and why it is taking them so long. It seems as if both the  
10 government and the OCA was just content in waiting until the OCAs  
11 came back to them saying, "Hey, we are done." They did not ask the  
12 questions that you expect to be asked in order to assess what was  
13 being done and you see from some of these responses, that even the  
14 OCAs themselves were not keeping track of what was being done, how  
15 often is being worked on. And, you can see that the OCAs may be  
16 prepared to take as long as they want to answer these questions and  
17 the Convening Authority and trial counsel may be prepared to allow  
18 them that time but Article 10 does not and speedy trial does not.  
19 And, you can see the fact that even from the government's own  
20 documentation, that the OCAs and the amount of time they took was  
21 unreasonably long. And, you can see that from the 18 March request  
22 forward because on 18 March, the government sent a requests to all  
23 the OCAs saying, "Hey, finalize your classification review, we are

1 giving you until 31 March." And then, over the next 5 months they  
2 sent again, the kind of cut-and-paste jobs to each of the OCAs and  
3 the took those 5 months in order to get the OCAs to complete the  
4 classification reviews. And that piece of evidence in and of itself  
5 shows how unreasonably long that was because if it were reasonable  
6 you would see a different type of tenor in these requests. You would  
7 see 18 March, "Hey, can you complete these, can you get these back to  
8 us within the next 2 months or 3 months if that is appropriate?" At  
9 least from the government's request, they believed a couple of weeks  
10 was appropriate and they continued to make those requests month after  
11 month, or at least on four separate occasions. In those requests,  
12 the government was saying and citing speedy trial concerns and they  
13 were telling the OCAs that, "Look, if you don't get the stuff to us,  
14 it could severely hinder our prosecution." And yet, they have argued  
15 here that you know, this is the amount of time that it took. You  
16 cannot have it both ways. And, the time for this to severely hamper  
17 or harm the government's prosecution is now because here is where we  
18 take a look to see did these OCAs respond in a timely manner, and  
19 they did not.

20 MJ: Should the prosecution be -- what is a defense's position  
21 about sort of imputing other agency responsibility to the prosecution  
22 team?

1 CDC[MR. COOMBS]: Yeah, the reason why that I would say that  
2 this is not an issue of, "Hey, we were diligent as the prosecution,  
3 we can't control what this other agency was doing." This is going  
4 back to *Pyburn* type example of, "Look, the other agency may not be  
5 diligent", perhaps they are not, but, you know, the buck stops with  
6 you. And, in this instance, the government needed to do more in  
7 order to cajole the OCAs to complete what they needed to do. And, if  
8 -- you have kind of two problems, one just the amount of time the  
9 OCAs took then also the time period in which the government was --  
10 made it seem as if, and there is some confusion here of like, when  
11 did they actually want them to start the classification reviews. So,  
12 if you just take the Department of State for example, you see that  
13 the discussion happened in 2010 timeframe, in 2011 timeframe, early,  
14 but they don't start it until 9 June of 2011 and it takes 4 months.  
15 And, they represent a good portion of the charged documents in this  
16 case as far as just the sheer volume and numbers. So, if you use  
17 that as kind of going back to your question about how long should a  
18 classification review take, apparently 4 months for the Department of  
19 State looking at 250-some-thousand documents, you know. So, if you  
20 backdated any of those things in the early 2011 time period. And,  
21 they certainly knew about these, that is the other ----

22 MJ: When was the last disclosures? I thought the Department of  
23 State, the big disclosure, was in the middle of 2011.

1 CDC[MR. COOMBS]: As far as the timeframe when all of the cables  
2 were disclosed, that is in -- the actual date is escaping me. But  
3 that is certainly in the 2011 time period but the government was  
4 aware of what was going on, they were identifying the cables that  
5 they wanted to charge in the 2010 time period, the late 2010. So,  
6 certainly by 1 March when they prefer their new charges, they know  
7 what they are charging obviously. So, if you would have started the  
8 classification review in the 2010 time period when you are  
9 identifying, and as the Department of State indicates, "Yeah, we  
10 basically carved out a particular amount of cables, ultimately it was  
11 125, 126." Well, this stuff was being done towards the end of 2010,  
12 beginning of 2011. And inexplicably then you have a time period  
13 break from early 2011, once they did identify the documents to 18  
14 March when the government asks them to finalize it to 9 June when  
15 they even begin it. And so, had they done this with each of the OCAs  
16 and had it done, we get back to the hypothetical of, maybe at 22  
17 April when the 706 board is done, the government is ready to start  
18 the 32. And then, we would have known if the defense needed a delay  
19 at that point I guess. But, that is kind of the biggest problem,  
20 that is one of the biggest problems in the Article 10 issue of the  
21 amount of time the OCAs took. The other big problem is how the  
22 government viewed its discovery obligations.



1 MJ: Before you get there, this might be a good time to take  
2 about 10 minutes.

3 CDC[MR. COOMBS]: Certainly, ma'am, yes.

4 MJ: Now you are transitioning into a new phase of your  
5 argument?

6 CDC[MR. COOMBS]: I am, yes, ma'am and so it would be perfect.

7 MJ: Okay. 10 minutes good for both sides?

8 TC: Yes, ma'am.

9 CDC[MR. COOMBS]: Yes, ma'am.

10 MJ: All right. Court is in recess until quarter after 1600 or  
11 four o'clock.

12 **[The Article 39(a) session recessed at 1607, 16 January 2013.]**

13 **[The Article 39(a) session was called to order at 1620, 16 January**  
14 **2013.]**

15 MJ: This Article 39(a) session is called to order. Let the  
16 record reflect all parties present when the court last recessed are  
17 again present in court.

18 Mr. Coombs?

19 CDC[MR. COOMBS]: Yes, ma'am.

20 So the second, I think, overarching issue in this case was  
21 a government's understanding of its discovery obligations. And, this  
22 has been the source of extensive litigation from, really, from 23  
23 February 2012 to late 2012. And, I do not want to go through each of

1 the things in great detail but I do want to cover some of the issues  
2 that really necessitated a very protracted and prolonged discovery  
3 phase to this case. And again, this is an example of litigation that  
4 is due to unreasonable positions being taken by the government but  
5 also not being proactive.

6           So the first is the trial counsel didn't believe R.C.M. 701  
7 even applied in classified evidence cases. That was their position.  
8 And, they maintained that position until corrected by the Court.  
9 Second, the trial counsel believed he was not required to disclose  
10 classified *Brady* information that was material to only punishment.  
11 Third, they maintained that the Department of State and ONCIX had not  
12 completed, in their words, a damage assessment but failed to  
13 acknowledge that they had even a draft damage assessment until forced  
14 to do so. And once they were forced to acknowledge that they had a  
15 draft damage assessment, then their argument was that these were not  
16 discoverable and they made that argument under *Giles*. Then they  
17 argued that, at least with the Department of State, that any  
18 information that predated the draft damage assessment was not  
19 discoverable because it was cumulative. That was their position.  
20 The trial counsel then argued that the FBI investigative file  
21 concerning PFC Manning was not material to the preparation of the  
22 defense; their litigation position. And, the Court asked, "Well, how  
23 could it not be material to the preparation of the defense?" Next,

1 the trial counsel believed that absent a specific request for  
2 information, the government was not obligated to turn over material  
3 that was obviously material to the preparation of the defense under  
4 R.C.M. 701(a)(2). And, you even hear echoes of that in today's  
5 argument by Major Fein where he is like, "Well, you know, we were  
6 waiting for specific requests and that would educate us on what we  
7 needed to do." And even in today's argument, the Court asked, "Well,  
8 in regards to the Quantico e-mails, you had a *Brady* obligation or  
9 once you looked at them, if they're material to the preparation of  
10 the defense you got to hand them over."

11 MJ: Well, do you believe that e-mails -- the government has  
12 posited to me that e-mails are more like statements and then fall  
13 under *Jencks*, not the R.C.M. 701. What is the defense's position?

14 CDC[MR. COOMBS]: I would say that in our motion we say that the  
15 -- and this is a new argument by the government but the e-mails are  
16 documents under 701(a)(2) but if they are statements, they want to go  
17 a statements, I would go statements too and I would say, look at  
18 701(c). They have a requirement to hand over statements as well.  
19 So, if that is their now newfound position on the issue, 701(c) is  
20 any sworn or signed statement relating to the offense charged in the  
21 case in which is in possession of the trial counsel.

22 MJ: Am I looking at something different? I have got 701(c)  
23 saying failure to call witnesses.

1 CDC[MR. COOMBS]: I am sorry, 701(a)(1)(C), ma'am. I am sorry.  
2 So, when you are looking at 701(a), the defense maintains that it  
3 would fall under 701(a)(1)(A) -- or, excuse me, just 701(a)(1). But,  
4 if they want to say ----

5 MJ: Well, how are they a sworn or signed statement, they are e-  
6 mail.

7 CDC[MR. COOMBS]: Well this is just the thing, I mean, if you  
8 want to say that is a statement, then when you send an e-mail, I mean  
9 granted, your signature block may be automatically put in there but  
10 people always put their name or what not. But, I think the thing  
11 that at least looking at that for a moment, that is kind of in a  
12 nutshell how the government has approached discovery in this case.  
13 It is late, it is incomplete and then ultimately they have to handed  
14 it over. So, in Quantico example, you know, 2 days before, after  
15 having this for apparently 6 months, they decide to look at it. And,  
16 under their argument, it is because of Jencks they are looking at,  
17 then they identify 84 e-mails they believe are obviously material to  
18 the preparation of the defense. And, we have the e-mail exchange  
19 between myself and two of the trial counsel same, "You know, are  
20 these the only e-mails? How many other e-mails are there? Are these  
21 the only e-mails you believe are material to the preparation of the  
22 defense?" And the answer is, "Yes, these -- you know, actually the  
23 answer is that there are 1,374 other e-mails but these are the only

1 ones that are material." Once we file our motion to compel, all of  
2 the sudden they hand over, voluntarily, 600 e-mails. And then  
3 ultimately the Court, with the exception just a handful, orders them  
4 to hand over the remainder of the e-mails. And that is emblematic  
5 really of the discovery in this whole case.

6 MJ: From a speedy trial perspective, the rules provide for *in*  
7 *camera* review when the sides disagree on what should be disclosed  
8 that we should not, so following that through, I guess I am having a  
9 little bit of difficulty in how that is relating to speedy trial.

10 CDC[MR. COOMBS]: Right, so----

11 MJ: That I could you have these tools that you can use to  
12 challenge, is it the defense's position, "Well, government, you can't  
13 challenge any discovery because we want a speedy trial?"

14 CDC[MR. COOMBS]: No, Your Honor. And, I think that is why when  
15 you go through the discovery missteps that it is important to see it  
16 in that light because oftentimes the missteps or the  
17 misunderstandings is what necessitated additional time. And even  
18 then, when they got corrected as to the right standard, then they  
19 needed additional time in order -- usually it is 45 to 60 days in  
20 order to either obtain the information or talk to the relevant  
21 Classification Authority on what they wanted to do, if they wanted,  
22 you know, give substitutions. And so, you had delays built in based  
23 upon their misunderstandings. But, had they correctly understood

1 discovery you would have hoped it would have been kind of advanced to  
2 the point that on the day of referral or -- not referral excuse me,  
3 on the day of our Article 39(a), our very first one, the government  
4 could have come to court and said, "Look, we have the following OCAs  
5 are going to claim privileges on the following information. We  
6 believe this information is not discoverable for these reasons. If  
7 the court disagrees with us though, we have got substitutions ready."

8 MJ: Well, what I guess, what process do the agencies -- the  
9 government cannot force -- what rules would have the government be  
10 able to force agencies to do anything before referral?

11 CDC[MR. COOMBS]: It would have been the proactive aspect of --  
12 and I think this is probably in our first 802 where I informed the  
13 Court that we are going to be filing a motion to compel discovery and  
14 the government said something along the lines of, "We are not for  
15 sure what the issues are and what not." And I say, "Hey, look there  
16 is not going to be any secret. We have been asking for this  
17 information in repetitive discovery requests. They know exactly what  
18 we are going to be asking for and what we are trying to compel." And  
19 so, from the defense's position, had the government, like let us say  
20 for the Department of State, even though they say they were not aware  
21 of the damage assessment but, let's look at the FBI stuff that they  
22 were aware of that they just did not feel was material to the  
23 preparation of the defense. They could have, in advance, gotten the

1 FBI to say, "Okay, look, if the court says I know your position is  
2 that it is not discoverable, you know that the government -- the  
3 defense wants it and likely will do a motion to compel." So being  
4 proactive, you could have just said, "Well, if the court orders us to  
5 compel this, FBI, what do you want to claim a privilege over, if  
6 anything? And, what would you want to have substitutions of, if  
7 anything?" Stuff that could have been done front loaded to where  
8 every time the Court made a ruling you wouldn't need 45 to 60 days.  
9 And there was at one point where in our motions for discovery said,  
10 "Look, we requested the Court order the government to be doing the  
11 dual track", something they argued they were doing all along. The  
12 dual track of, "Look, you can litigate that it is not discoverable  
13 but also prepare in the event that the court says it is."

14 MJ: Isn't that a lot of work for the agencies?

15 CDC[MR. COOMBS]: For the agency, as far as coming back saying -  
16 ---

17 MJ: Well, if you are saying all of the 505(g) substitutions and  
18 redactions and all that is, I mean, are you saying that speedy trial  
19 requires everything be teed up before the Court rules that it is even  
20 discoverable?

21 CDC[MR. COOMBS]: No, Your Honor. But, when the positions you  
22 know you are going to be taking, such as 701 does not apply to  
23 classified discovery, knowing that you don't have any case law to

1 support you on that, or taking the position that *Brady* information,  
2 at least when dealing with classified information, does not apply to  
3 sentencing, when you are taking those type of litigation positions,  
4 then, yes. The defense's position would be that you need to then  
5 know your position is not the most solid and if you lose you need to  
6 be prepared in order to hand the information over. You cannot at  
7 that point say, "Okay court, now you told us we need to give this, we  
8 need 45 to 60 days in order to coordinate these other substitutions  
9 or to find out whether or not anyone is going to claim of privilege."  
10 So, when I am talking about the discovery missteps and how that  
11 impacted Article 10, I am not including in that legitimate disputes  
12 on discovery where that, no that should not be held against the  
13 government, but when they are taking the positions they are, then  
14 yes, those time periods should apply.

15           So when you look at those, we do have a few issues that are  
16 very well documented, they are in our reply so I will not go into any  
17 detail unless the Court has questions on them. But, looking at *ONCIX*  
18 as an example, we have inconsistent stories at best as to what the  
19 government knew and when they knew it with regards to the *ONCIX*  
20 damage assessment and whether or not it was a draft or they were  
21 aware of the draft. And, when you combine that with the Department  
22 of State, not only with the Department of State discovery that  
23 ultimately had to be compelled, but the damage assessment and the



1 positions of the government took at the behest of the Department of  
2 State such as the *Giles* position or the *Touhy* requirements. You see  
3 there where you have unnecessary time built-in based upon positions  
4 that the government could not have believed they were advancing in  
5 good faith. And, those times should be applied against them for  
6 Article 10 purposes. The 63 agencies, and I guess there is like 57  
7 that ONCIX comprised its damage assessment from, again, we have  
8 inconsistent stories at best as to when the government reached out  
9 those agencies to get the damage assessments. Some accounts is, "We  
10 did it in 2010", we also then have an e-mail and 27 February 2012  
11 after the arraignment where a paralegal is saying, "Hey, we just  
12 found out we need to go directly to you to get these documents."  
13 Again, inconsistent stories but stories that at the least, show a  
14 lack of diligence in obtaining information. And, one of the Court's  
15 questions to the government when they were going to their facts was,  
16 "Well, where is the defense stuff that you are obtaining, you know,  
17 reaching out to get?" And they basically say, "Well, if we had it we  
18 sent it out immediately or we took our litigation position of, 'you  
19 did not give us enough specificity', or you are not entitled to it or  
20 what not." But, I think all of their accounting shows their efforts  
21 to perfect their case, How much exchange they had with the FBI, the  
22 Department of State, other agencies to get information they needed.  
23 Our whole discovery battles are almost issues of first impression

1 with them trying to go get information, such as from the Department  
2 of State.

3 MJ: Well, what is the defense's position on that? R.C.M. 701  
4 appears to have discovery trigger on referral -- I mean discovery for  
5 the defense has not part of the government's case-in-chief other than  
6 Article 32, 405 discovery.

7 CDC[MR. COOMBS]: And I would agree -- the defense would agree  
8 with that that is when their discovery obligations kick in. But,  
9 Article 10 would exact a more proactive requirement on the  
10 government's part to at least identify this information. Certainly  
11 when now, and I am sure all the parties, and I know I can speak for  
12 myself, that on 8 February 2011 when we had our 802 session, I did  
13 not envision a time in -- excuse me, 2012

14 MJ: You mean 2012?

15 CDC[MR. COOMBS]: I did not envision a time in 2013 when we  
16 would still be talking in a courtroom at least about the same case.  
17 So, and a lot of that was because of this discovery. And so Article  
18 10, I think, would require them to be a little more proactive than  
19 they have been. And a good example of not being diligent is with HQ,  
20 DA, their own agency. There they apparently sent out a request on 29  
21 July 2011 for HQ, DA to capture information that would be relevant to  
22 this case. And it was by sheer utter luck that I have previously  
23 argued, that the defense was aware of the fact that HQDA had never

1 done anything. They did a memo on 17 April 2012 saying, "Hey, you  
2 know what, we never collected any of this, we were not responsive."  
3 And then again, the government has to go out and get this  
4 information.

5           The Quantico e-mails we discussed, each of the main issues,  
6 the ONCIX; the 63 agencies; FBI; Department of State; HQ, DA; every  
7 one of those is where ultimately we got the information. And in each  
8 position, the government's, at least the defense's argument is, that  
9 the government's position was not with a firm understanding of its  
10 discovery obligations. And so, when you combine those two, the basis  
11 for the delay or the cause for delay, we would say Article 10 would  
12 say, the government was not diligent both the obtaining of the OCA  
13 classification reviews and in the discovery obligations. And those  
14 time periods should be held against them for Article 10 purposes.

15           The third factor is a demand for speedy trial. And this is  
16 a rather straightforward factor, did the defense make a demand or  
17 not? And, we made our first demand on 13 January but then we renewed  
18 that demand on 25 July and in the oppositions to the monthly delay  
19 request by the Convening Authority. And each of these speedy trial  
20 demands were made legitimately. They were not made in order to set  
21 the government up in order for them to say, "Okay, let us go", and  
22 then, we ask for a continuance. That was not the scenario. The  
23 demand -- I think when you look at this case with any other type of

1 military justice case, these demands were made well into the second  
2 year. And when you see the movement of the case being at a snail's  
3 pace and your client is in pre-trial confinement, that is when this  
4 demand comes. And, as the defense explained earlier, it was no  
5 mistake that demand was on 13 January, one month after our  
6 preliminary classification review was completed, because we viewed  
7 the 706 board as the only hurdle to get the Article 32 going. And  
8 when the government, in a month time period had not done anything,  
9 from the defense's perspective, to get the 32 started excuse me, 706  
10 board started again, that is why we made our demand, recognizing that  
11 I was still during a time period which otherwise would count -- not  
12 count against the government because of our request for 706 board.

13 MJ: What is the defense's position? On the 25th of July 2011,  
14 did you know -- did the defense know that the main cause for the  
15 delay was getting the OCA reviews?

16 CDC[MR. COOMBS]: Yes, at least that was our understanding. And  
17 the reason why is because when you look at their cut-and-paste memos,  
18 it was to get -- it was always to get the OCA classification reviews  
19 and then they would occasionally throw in something else and then  
20 that would be done but the classification review was the one  
21 consistent. And, all the other bases for a excludable delay from the  
22 defense's position would not hold up the 32. And, we were arguing,  
23 both in the 25 July and -- but primarily on 25 July, that you had

1 other alternatives, substitutions that you could direct in order, and  
2 still move forward with the 32.

3 MJ: Did you say that the defense waives to any challenge of the  
4 classification of the documents at that time?

5 CDC[MR. COOMBS]: No, we did not, ma'am.

6 MJ: Okay.

7 CDC[MR. COOMBS]: Nor was that asked of us. And, but I do think  
8 that you could read into that when we are arguing to the Convening  
9 Authority that, "Hey, look at your alternatives, your substitutions  
10 for classified information, summaries, you know, to move forward with  
11 the 32." And so, when we make our demand, at least on the 25 July,  
12 again, I think a proactive trial counsel at the very least would then  
13 respond with, "Okay, look, Convening Authority, here are the reasons  
14 why." So, the very next one would have laid out the reasons why they  
15 needed to wait and given a detailed update, our main criticism that  
16 you have not provided any details to the Convening Authority, would  
17 have provided those details as to what was being done. So, as PFC  
18 Manning's first speedy trial request was well in advance of both the  
19 arraignment and the litigation of this case, in fact it was 407 days  
20 before his arraignment on 23 February and 733 days before the  
21 litigation; the speedy trial motion here today.

22 The final factor is prejudiced to the accused. And, there  
23 the courts look at basically three factors: to prevent oppressive

1 pretrial incarceration, to minimize anxiety and concern of the  
2 accused, or to limit the possibility that the defense will be  
3 impaired. And, the Court has already found that the pretrial  
4 confinement was at least an Article 13 violation, at least some of  
5 it, so that would most certainly meet the oppressive category. And  
6 the sheer length of time that PFC Manning was in pretrial  
7 confinement, the common sense conclusion to that would be that yes,  
8 that would cause anxiety and concern because he has been deprived of  
9 his liberty now for 964 days. But, the main problem here is this  
10 last factor, and that is prejudice to the defense and the defense  
11 would be impaired. And in this instance, we see this again with the  
12 fading of memory of witnesses as time goes by. And, I am certain  
13 there will get the merits we will have that answer more than once, "I  
14 do not recall. I do not remember."

15 MJ: In your interviews with witnesses thus far have you got  
16 anything concrete that you want to put on the record with respect to  
17 that?

18 CDC[MR. COOMBS]: Nothing -- well, no ma'am. What I would say  
19 is in my interviews of the witnesses so far I am asking about  
20 factors. There are certainly examples where they would say, "Well, I  
21 don't recall that. It has been a while." There is nothing that I  
22 can say concrete at this point as a fact that would hurt the defense  
23 but I am sure there will be those. But the Article 13 we certainly

1 see that when they couldn't remember certain things or understand who  
2 was there. One of the main things of the standing naked in his cell,  
3 and I understand, you know, we did not have witness testimony there  
4 but it would have been helpful to know who was in that guard room.  
5 You know, if the motion were done shortly after this incident we  
6 would know. And, we could have brought that person and they could  
7 have then testified and the Court could have seen their demeanor and  
8 judged. But again, it is just common sense, I think, that witnesses  
9 are going to say, "It has been several years, it might be important  
10 to your client but for me I have got other things going on so I don't  
11 recall." And, when you look at that, all of those factors, the  
12 defense's position is that this does spell an Article 10 violation.  
13 And just because a given time period might be properly excluded under  
14 707, and there are some time periods certainly, that the government  
15 is on the hook the entire time for Article 10 and they cannot be  
16 excluded that time period by the Convening Authority, a court or  
17 anyone. And because of that, when you look at all this time, the  
18 defense's position is it is an Article 10 violation. And under  
19 Article 10, the only remedy is dismissal with prejudice.

20 MJ: All right, thank you.

21 CDC[MR. COOMBS]: Thank you, Your Honor.

22 MJ: And is there anything further from the government?

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: Okay.

2 TC[MAJ FEIN]: Ma'am, the intent of the government on this  
3 rebuttal is just to clarify some factual issues based off of mostly  
4 defense excuse me, the Court's questions to the defense.

5 Your Honor, in the defense's motion or, in their motion or  
6 reply, excuse me, and our response it is not contested whether it is  
7 a complex case or not. I think the issue is how complex and what  
8 defines complexity. The United States argues, in reference to a  
9 question the Court has asked both parties, "Is there any other case  
10 that would be similar as far as possibly complexity, security  
11 clearances, amount of evidence, volume of evidence?" The United  
12 States argues there is one factor that makes this case probably the  
13 most unique of any other Article 10, speedy trial case, that starts  
14 the complexity and the rest of the factors I will go over in a minute  
15 increase the amount of complexity. And that single factor, Your  
16 Honor, is the actual timing of the offense and how this -- how  
17 Private First Class Manning was found to have committed the offense  
18 and the investigation that ensued and the ongoing releases that  
19 caused the national security concern. The reason to compare and  
20 contrast that to the majority of the Article 10 cases is that the  
21 crimes are completed, the effects of the crimes are known and then an  
22 investigation ensues. Co-conspirators are determined, either if it  
23 is a co-conspirator case, one testifies against another, that causes



1 delay. If it is a case that requires unique or voluminous evidence,  
2 at the time of the clock running, so that will be pretrial  
3 confinement or preferral of charges, the population of information or  
4 the total amount is known at that time. What is clear from testimony  
5 and from the documentation and evidence presented to the Court is  
6 that that was not known really, I mean again, even today it is not  
7 known, but the government had to make a decision to move forward,  
8 balancing the accused's speedy trial rights and to have proper  
9 accounting for the alleged misconduct. But, the decision to charge  
10 additional charges was on 1 March, that was a government's cut off at  
11 that point for the misconduct that occurred the previous year, all  
12 the way up until the beginning of May 2010. So, the reason the  
13 United States argues this is the defense is very fast to use certain  
14 numbers and saying why to 270 days for classification review from the  
15 Department of State to even get started formally, because that is  
16 running in number from 27 May 2010 all the way until March of 2011.  
17 But the evidence before the Court both in the OCA declarations, the  
18 trial counsel decorations, the trial counsel requests that have been  
19 submitted, and the proffers made throughout the entire life of this  
20 case in front of this Court is that the information was not even  
21 known to what to be charged, figured out, until the fall of 2010. So  
22 although, yes, there is no question the government is not contesting  
23 that Private First Class Manning's speedy trial rights attached, I

1 guess technically for Article 10, it would be sometime after pretrial  
2 confinement started, not the day pretrial confinement started based  
3 off the case law. But anyways, it attached once he is in pretrial  
4 confinement, at least for least R.C.M. 707, eventually Article 10 and  
5 it started running. But the complexity of this case that makes it so  
6 unique is that the government could not have understood the extent of  
7 the alleged misconduct until months gone by and the evidence was  
8 collected and analyzed. And, that is what the government has  
9 presented to the court and for the court to review.

10           Now, other factors that the government argues is the number  
11 one factor for complexity, but the other is procuring of evidence,  
12 obtaining authority to disclose evidence, forensic evidence itself,  
13 not just you know, a gun, not just a bloody knife or a glove, this is  
14 forensic evidence that had to be fully analyzed, more than 20  
15 separate pieces. The United States government widespread reaction,  
16 the mitigation efforts that had to occur as outlined in the different  
17 damage assessments the defense and the Court has seen that had to  
18 occur immediately to lessen the impact to national security, that  
19 effected the law enforcement investigation and the prosecution. The  
20 numbers of organizations involved, classification level and number of  
21 documents compromised, the classification level of the documents  
22 subject to discovery, security clearances, even for civilian defense  
23 counsel, misconduct occurred in theater. This happened in Iraq and

1 then the majority of analysis after the summer then occurred back in  
2 the DC area. The ongoing nature of the crime and ongoing disclosures  
3 including all the way up until today, M.R.E. 505(h). So, the  
4 government argues all of those factors are what makes it complex but  
5 not trying to minimize that the major factor of why this case is  
6 different than all others.

7           Next, overall Your Honor, and then getting into specifics,  
8 the government has never contended that the reason for the delay was  
9 solely for classification reviews. It was a major factor, but it was  
10 no greater of a factor than all the other factors presented to the  
11 Convening Authority in every 30-day memo. That was an accounting  
12 memo starting in October and then that started with the prosecution's  
13 request. In fact, even those request memos starting in April did not  
14 have classification reviews except for as a subsection, it was  
15 disclosure of evidence. Classification reviews are just one piece of  
16 evidence. That was the major driving factor. So, the defense wants  
17 the Court to believe that if all the classification reviews had  
18 occurred by April 22nd with some reasonable or some minimal amount as  
19 time as long as you had classification reviews, we could have gone to  
20 trial. But what the Court cannot forget when you review this, Your  
21 Honor, is that the CID case file was not even given to the defense  
22 because we did not have authority to do that until after that point.  
23 So, that means we would have been going to an Article 32 when the

1 defense and -- well the defense, did not have access to even the  
2 unclassified CID file, let alone the all of the evidence that  
3 supports the charges on the charge sheet. That occurred over the  
4 summer, that is disclosure of evidence, both unclass and classified,  
5 all the way until October 28 ----

6 MJ: So, talk to me about that. You have the CID file, what  
7 took so long?

8 TC[MAJ FEIN]: Well, ma'am, the CID file first was ongoing. It  
9 was being created as we -- as the evidence we have are spoke about,  
10 once it was finally coalescing around February, and this is in the  
11 trial counsel's declaration, in the February timeframe, the  
12 prosecution said, "Listen, we have additional charges coming, we need  
13 to disclose that under our obligations." So, CID started putting it  
14 together, getting it packaged, ready and then gave it up to us and  
15 that is when we started sharing it with certain organizations and  
16 partners and other law enforcement organizations. And, that is when  
17 it was identified to us, the prosecutors, that it contained potential  
18 classified information. We, as attorneys, Your Honor, would have no  
19 -- I mean, frankly, other than what we have seen already, we have to  
20 be told when there is classified information unless it is completely  
21 blatant or marked. This is the unclass CID case file. Once that was  
22 identified, and all of these dates are in our declaration, once that  
23 was identified, then we had to have that file reviewed. It had grand

1 jury information in it as well because CID worked closely with the  
2 Eastern District of Virginia and the FBI as a joint investigation,  
3 and it had classified material that, unfortunately, was not marked  
4 properly because most of it was witness interviews. In those AIRs  
5 the witnesses said, "I do not think this is classified." The CID  
6 agents had no reason to know whether it was or was not, they had to  
7 take the interviewee's word for it; they did. And then, once it  
8 started getting reviewed, that is what happened. So they received  
9 that over the summer, the exact dates again are in the prosecution's  
10 declaration and our discovery, Enclosure 18. And, that is what  
11 occurred over the summer, Your Honor. And it was not until the fall  
12 that we finally had approval to turn over all of the remaining  
13 classified material, and that is when it was given. Classification  
14 reviews were just one of the many different pieces of evidence.

15 Now, Your Honor, very specific points. The defense talks  
16 about how for under R.C.M. 707, the period of time between 12 July  
17 excuse me, 28 July and 4 August, there is a 10-day period in that  
18 Colonel Coffman under no circumstance should have been able to, on 11  
19 August, I guess, retroactively adopt that delay period. What is  
20 briefed already in the written briefing and just to outline for the  
21 court, is Enclosure 11 to the government's response to speedy trial  
22 first has the memo dated 11 July from then Captain Paul Bouchard, the  
23 defense counsel on the case in Iraq who requested the original delay

1 of the 32. 12 July, the second request, but the key two requests  
2 here, Your Honor, is on 11 August 2010, then, as the temporary lead  
3 counsel, Major Hurley submitted a memo through the IO to the  
4 Convening Authority, and doing it for a delay request. And in this  
5 request, Major Hurley specifically says the defense requests a delay  
6 in the court-martial you ordered under the provisions of R.C.M. 706  
7 until it is completed. The defense maintains responsibility for this  
8 delay because Captain Paul Bouchard initially requested the inquiry  
9 from PFC Manning's previous chain of command. So the Convening  
10 Authority adopted what the defense submitted as they were accepting  
11 that is what it was, and case law supports that the Convening  
12 Authority can do a retrospective, even if a previous command, because  
13 it was an ongoing delay request. And, the government, the evidence  
14 shows, was continuously working on the 706 board. The old command  
15 handed it off to the forward command, that was one of the two main  
16 reasons Private First Class Manning moved to the DC area. And then  
17 also Your Honor, on 25 August 2010, Mr. Coombs submitted a request  
18 for appointment of an expert and even recognizes that on 18 July,  
19 though the date is incorrect, the defense requested a 706 sanity  
20 board be appointed. So, even in this memo, Mr. Coombs as the new  
21 defense counsel, recognizes that the current 706 really is operating  
22 under what was requested in theater, not what was requested by the  
23 current defense counsel.

1           Your Honor, next time period, this is dealing with between  
2 13 December 2010 and 3 February 2011, on whether the 706 board could  
3 move forward or not. And, the defense specifically stated ----

4           MJ: What are those dates again?

5           TC[MAJ FEIN]: I am sorry, 13 December 2010 until 3 February  
6 2011, Your Honor.

7           MJ: All right.

8           TC[MAJ FEIN]: The defense said that, "The US Government, the  
9 prosecution, was being reactive not proactive", and then, interesting  
10 enough, said, "Did nothing to prepare for the R.C.M. 706", during  
11 oral argument. And then, specifically said, "You would expect the  
12 government to be proactive and say that this would be reasonable.  
13 Two things would be reasonable, one, to identify a SCIF location  
14 ahead of time; two, identified board members ahead of time." Your  
15 Honor, both of those tasks were completed, not one change, but the  
16 prosecution did that with the 706 board. Your Honor, that is  
17 evidenced, I will give you the exact pinpoint, Your Honor, the  
18 prosecution's declaration, Page 21 and 22. Page 21, the government  
19 explains how on 9 September 2010, the original standing board members  
20 were selected and were standing by: Doctor Sweda, Lieutenant Colonel  
21 Schneider, and Captain (Promotable) Benesh. And then on 21 December,  
22 Lieutenant Colonel Hemco replaced Schneider, that did occur. And  
23 then once it was formalized and the clearances were worked on, and

1 all of the information after the holidays, that is when the  
2 clearances started. And second, Your Honor, on Page 22, answer to  
3 Question number 103, this is where the prosecution explains that a  
4 SCIF location was identified but defense stated they wanted a  
5 different location. That is also on e-mail that has been provided to  
6 the Court. And it was only based off of the defense request to find  
7 a different location from what the prosecution already found, that is  
8 why there was not a location identified during that period of time.

9           Next period of time, Your Honor, 4 March to 22 March 2011.  
10 This is the reason, Your Honor, the government included e-mails  
11 between the 706 board members, prosecution and defense for the Court  
12 to review because in those e-mails, the Court will see not only how  
13 defense requested to meet with their client, we have are discussed  
14 back and forth, but what has not been discussed and was not briefed  
15 on the -- or isn't readily available in the slideshow, is that  
16 additionally, the defense requested that their experts sit in with  
17 the board. The board was not comfortable with that and they also had  
18 to coordinate their defense expert to take part in the 706 board.  
19 And, a lot of that time was coordination between the defense expert,  
20 based off their request, and the board. And again, those e-mails are  
21 there. Instead of just cherry picking one or two, they are all  
22 there, Your Honor, of this timeframe and they are in numerical order.  
23 We can pull the exact ones if you want it, at least the range, but



1 the 706 board section is very small. That will account for that time  
2 of what was going on.

3 Your Honor, in reference to OPLAN B, so this would be the  
4 16 November to 15 December of 2011 timeframe, defense argues that on  
5 16 November, Colonel Coffman stated that or during his testimony, he  
6 stated that if he did -- could he have ordered OPLAN B to start  
7 earlier than 16 November if he had all the classification reviews and  
8 then there was a colloquy between the Court and the defense earlier  
9 about well, at some point, it be too early essentially, or could it  
10 be? Well, the fact to not be lost here is that even on 16 November  
11 when the prosecution briefed Colonel Coffman, and it is in our  
12 written memorandum, the prosecution even stated that we do not have  
13 all classification reviews, we have all but one but we have been  
14 given assurances that we will have that last one no later than 2  
15 December, and even included a redacted classified e-mail so Colonel  
16 Coffman and the defense could see that. And, the Court has that for  
17 review as well. So Colonel Coffman made that decision weighing risks  
18 on whether all the class interviews would be done. And so, although  
19 the very last step, the government would concede, is at last  
20 classification review because all of the other evidence had been  
21 disclosed by 4 excuse me, 8 November and this was 16 November.  
22 Colonel Coffman ordered it. If he was simply waiting definitively to  
23 have them all in hand then he would have waited until 1 December

1 because that was the date the government actually received the  
2 classification review and then would have ordered it.

3           Your Honor, this might be clerical or maybe not, as far as  
4 one period of time, the period of time between 3 February, which of  
5 course was referral, and 23 February, arraignment. Defense, during  
6 oral argument, said 8 February, the first R.C.M. 802 conference over  
7 the telephone is excludable from 8 February to 23 February. The  
8 government argues under the trial judiciary rules and local rules, it  
9 is 3 February through 23 February is excludable and that is Rule 1.1,  
10 Trial Judiciary Rules. And, just for quick reference, Your Honor,  
11 the Court -- the government e-mailed the Court the EDN with the  
12 referral packet on 3 February at 1819 hours and that is when the  
13 Court should have received the actual charges at that point.

14           Next, Your Honor, the argument that Colonel Coffman as a  
15 special court-martial convening authority was simply a rubber stamp  
16 and did not, in every document he -- well, not every document, every  
17 delay was this cookie-cutter and the same. What I think the defense  
18 consistently either is not explaining and the government wants to  
19 ensure the Court understands is that it incorporates and references  
20 any defense filings and any prosecution filings. So, the prosecution  
21 has already, in a previous session, gone over each of these monthly  
22 memos so I am not going to do it again. But, we would like to at  
23 least point out at least in Enclosure 11, Your Honor, to the

1 government's motion, is each of the monthly delay requests after 22  
2 April, which outlines every reason for request and updates the  
3 Convening Authority at all of the activity, and the defense at the  
4 time, of all of the activity is going on. So, at any point during  
5 this, the defense knew exactly what was going on and what still  
6 needed to occur, not just classification reviews, that is one of many  
7 factors, and is listed, Enclosure 11, Your Honor.

8           Your Honor, and as far as prejudice the accused: Witness  
9 memory. First off, Article 13 is a good and bad example. The  
10 defense wants to argue that the placement of a motion and when it  
11 occurs somehow should be imputed on the government as an additional 9  
12 months of memory loss. The Article 13 litigation could have been the  
13 first motion in February that could have occurred. And then that  
14 extra 9 months, and it goes back to this playing with numbers, Your  
15 Honor, if the government did not even have the capability to  
16 understand the complexity or what actually occurred in this case  
17 until mid to late fall of 2010, the additional charges were not until  
18 March of 2011. It is less than 1 year after the additional charges  
19 that we had this case referred. The Article 32 happened 2 months  
20 before so, it is less than a year at that point, Your Honor. Once  
21 the government truly understood how the accused could have committed  
22 or did commit his crimes with all of the forensics that witnesses  
23 were called, testimony was preserved during the Article 32 for those

1 witnesses. The defense had an opportunity to call any witness they  
2 wanted. Some were denied, others were not, so if that was really an  
3 issue it could have been preserved at the Article 32 if the defense  
4 chose to, if that was a true concern of the defense. Article 13, of  
5 course, would not have been part of the preservation.

6 Your Honor, reasons for delay: Normal military justice  
7 practice. Granted, the defense counsel definitely has combined more  
8 years of practice in Military Justice than the prosecution table, but  
9 the prosecution is unaware of any military justice case, except for  
10 well no, no military justice cases that require the amount of  
11 coordination both within the Department of Defense and outside of the  
12 Department of Defense with so many issues involved than this one.  
13 This is not normal military justice practice with the requirements  
14 that this case has had. And, Your Honor, this does not stem from the  
15 charge sheet, this stems from the alleged misconduct that caused the  
16 government, the command, to issue charges or swear out charges.

17 Your Honor, as far as classification reviews, I have  
18 already discussed the different timing, the government would just ask  
19 that Court, if the Court does review again the different declarations  
20 that the government presented from the OCAs, the numbers that the  
21 defense submitted are fair, their conclusions are fair in there  
22 however, their out of context, specifically for instance the CENTCOM  
23 explains exactly why it took so long and the INSCOM one explains also

1 I took so long. The defense, during oral argument today, explained  
2 how Mr. Paul was supposed to be the one doing the classification  
3 review. Well, INSCOM in the declaration explains why it took extra  
4 time, because their expert was conflicted out so they had to figure  
5 out who else could do it. And, those nuances are explained in those  
6 declarations.

7           Your Honor, the defense argues that there is no  
8 documentation showing the trial counsel pushed OCAs through the  
9 finish line, to the finish line other than the documentation that the  
10 Court has in front of you, the different memos that were submitted,  
11 granted, they were very similar in nature but those memos were also  
12 followed up with phone calls or preceded by phone calls and that is  
13 annotated in both the prosecution and the OCAs declarations as well.

14           Your Honor, in reference to discovery obligations, the  
15 defense argues that the prosecution's unreasonable positions caused  
16 protracted litigation. Unfortunately, Your Honor, I think that is  
17 best stated as that Military Justice causes protracted litigation in  
18 a complex case. The defense has also had unique positions and that  
19 is why we have an adversarial system. It takes a military judge to  
20 arbitrate ultimately and decide those positions such as motion to  
21 identify *Brady* material; arguing that grand jury and FBI somehow is  
22 in the possession, custody or control, their information, of an Army  
23 prosecutor; specificity, over and over again requiring specificity

1 and the defense not providing it, so the government having to provide  
2 them witnesses to give them the specificity. But again, it is just a  
3 position that offense took and litigated as well. Unique litigation;  
4 motion to dismiss that was unique and had no precedents based off of  
5 discovery issues. And even today, Your Honor, 701(a)(1)(c) for  
6 statements, it says that, "serve as the basis for charges"; that  
7 would not be an Article 13. Any evidence from Article 13 would not  
8 serve as the basis of charges. The point here, Your Honor, is that  
9 both parties are adversarial and have developed legal positions and  
10 argue those and the parties need a military judge, a court, in order  
11 to finally adjudicate them.

12           Your Honor, the defense also argues that somehow the  
13 prosecution should plan for every contingency by having everything  
14 somehow frontloaded, all the discovery issues, prior to referral of  
15 this case. But, the government cannot plan for contingencies. The  
16 government, if there is information used to produce, it is produced.  
17 FBI is a great example, the defense uses the FBI actually is an  
18 example on how the prosecution focused on a perfection of its case  
19 versus discovery. The prosecution is maintained from the beginning  
20 there is very little to none of the FBI material that the prosecution  
21 intends to use in its case in chief. In fact, it is only on very  
22 specific type of information that is unrelated to the Private Manning  
23 case and then one other specific that is unrelated to the Private

1 Manning case. When it comes to the FBI's file for Private First  
2 Class Manning, that is simply what we are obligated to turn over and  
3 should turn over to the defense and that was frontloaded, Your Honor.  
4 The record is complete on this, up to the point of once the Court  
5 ordered on 16 March 2012, a protective order, that day the  
6 prosecution handed over the first majority of the information wave of  
7 FBI material to the defense. That was frontloaded and it was not to  
8 perfect the government case.

9           Your Honor, as far as Headquarters, DA again, is another  
10 unique argument from the defense that somehow because the defense was  
11 lucky to come across one memo, that is why they received that  
12 information. What the defense is failing to recognize from the  
13 declarations and the previous filings is that the prosecution, was  
14 already working on that. The prosecution sent their Deputy SJA up to  
15 the OTJAG to actually retrieve the information excuse me we do not  
16 send our Deputy, we ask our Deputy. We e-mailed multiple times as we  
17 have sworn to and our declaration. The prosecution was already  
18 working to obtain that information. It is unfortunate that it took  
19 so long because the prosecution and even the OSJA do not have the  
20 power to commandeer this information but we were working on it. It  
21 only came to light to the Court because the defense came across a  
22 memo that they then used to justify their motion. But, the  
23 prosecution was already working was already working to disclose that

1 material. So, it was not because the defense stumbled across  
2 something, this is just another example of how the prosecution  
3 frontloaded as much of the discovery issues as possible before  
4 referral so once an issue came up, we could have a judge properly  
5 adjudicate.

6 Your Honor, subject to your questions.

7 MJ: I do not have any, thank you.

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: Mr. Coombs, any final thoughts?

10 CDC[MR. COOMBS]: Just a couple, Your Honor and only because I  
11 do not think this is in our reply but I think most of the issues that  
12 the government just brought up are directly dealt with in our reply.  
13 We also would say that the e-mails I think lay out the objective view  
14 of this so if the Court does not want to take a spin from the  
15 government or from the defense, I think the e-mails speak for  
16 themselves on the 706 issues. The one thing I am not for sure is in  
17 the e-mails, but I wanted to alert the Court, is that the initial  
18 SCIF, which the defense's memory of this is that it is much earlier  
19 than the time period that we are talking about, but the government  
20 identified CID as a SCIF location and the defense's memory of our  
21 conversations with the government was that just did not pass the  
22 common sense test. Maybe we should look for a different SCIF and the  
23 government agreed. So, it was not an issue of us refusing, the



1 defense's memory of this was it was an exchange of just an open  
2 conversation of what you think of CID SCIF as being a location? And  
3 ultimately, we agreed that that did not pass the common sense test  
4 and we would look for a different location. So, other than that, the  
5 other issues that Major Fein brings up in his response, I think our  
6 reply motion lays our position out.

7 MJ: All right, thank you.

8 All right, I have heard argument on this issue. I have  
9 both side's submissions, I have the supplements to the submissions  
10 from both sides, I have the corrected copies of those submissions  
11 from both sides. I had e-mails, I have R.C.M. 706 e-mails, Colonel  
12 Coffman e-mails, defense counsel and trial counsel e-mails and  
13 interrogatories. The Court will be taking this motion under  
14 advisement and will have a ruling on or before the next session which  
15 is going to be starting on 26th of February.

16 We still have a few additional things to go through today.  
17 I am going to need a little bit of time just to finalize some issues,  
18 but I wanted to, before I do that, they are judicial notice and  
19 Ambassador Galbraith. And just for my education, retired  
20 ambassadors, are they called Ambassador Retired or they just called  
21 Ambassador?

22 CDC[MR. COOMBS]: It is just Ambassadors, Your Honor.

1 MJ: Does either side desire to state anything further with  
2 respect to the judicial notice motions since I got the defense's  
3 response yesterday and the government's supplement a little bit  
4 earlier?

5 [Pause]

6 MJ: Do not feel forced.

7 ATC[CPT MORROW]: Your Honor, only a couple of questions about  
8 the hearsay objections. I think government stated pretty clearly  
9 what the relevance of this information was, or the facts were. But,  
10 if you have any questions about taking judicial notice of, you know,  
11 a date or that something was published, then I think that, yes, you  
12 know, if that calls for hearsay then the government would like to  
13 explore that, but we do not think that is a valid hearsay objection.  
14 And, the government will just say that we look to your ruling already  
15 on the Finkle book. You already took judicial notice of the  
16 existence of the book, excerpts and the date of the publication. So,  
17 you know, with respect to the *New Yorker* article, as well as a *New*  
18 *York Times* article, we do not think those are major issues for the  
19 court, certainly not hearsay issues.

20 MJ: Okay, and I believe the defense's or one of the other  
21 defense objections was relevance, is that right?

22 DC[CPT TOOMAN]: Yes, Your Honor.

23 MJ: Okay.

1       ATC[CPT MORROW]: So, only if you would like to hear more on  
2 relevance or hearsay.

3       MJ: Well, I guess we are looking at this is, wouldn't I be in a  
4 better position to look at relevance when we are actually at the time  
5 of trial when you are offering that?

6       ATC[CPT MORROW]: That is correct, Your Honor. And at that  
7 point, I guess we could. The issue is, that least with respect to  
8 chat logs, they may be admitted and then -- well ----

9       MJ: I guess, where I am looking at this, and government, and I  
10 will just tell you where I think I am going, and if either side wants  
11 to discuss this any further, if the objection is relevance and that  
12 is it, or relevance and hearsay, the Court can rule that I will take  
13 judicial notice upon a showing of relevance and a non-hearsay purpose  
14 at the trial as opposed to doing this all hypothetically now.

15       ATC[CPT MORROW]: That is fine, Your Honor. The government has  
16 no objection, but we ----

17       DC[CPT TOOMAN]: Your Honor, the defense is fine with that as  
18 well because we would say that the government has not proffered  
19 adequately the relevance of these things and so if the Court wants to  
20 wait, certainly for many of the things in our response, I think it is  
21 clear that if the Court finds that they are relevant we would have no  
22 other objection. So, if the Court wants to defer until a showing of  
23 relevance at trial, there is no defense objection to that.

1 MJ: So, I guess would be a conditional judicial notice ----  
2 ATC[CPT MORROW]: I mean, upon admission of the chat logs, we  
3 would argue that these are absolutely relevant. So, I mean, if you  
4 want to wait--if the court wants to wait until the admission of the  
5 chat logs ----  
6 MJ: Which one is the chat log?  
7 ATC[CPT MORROW]: The Lamo chat logs as well as the chat logs  
8 between ----  
9 MJ: Did you add new things in your supplement that you want me  
10 to judicially notice that you had not asked before? I thought the  
11 supplement was just to explain the addendum.  
12 ATC[CPT MORROW]: It was, Your Honor. You asked for additional  
13 sources then you asked -- no, you didn't ask for anything additional.  
14 MJ: I thought there were A through H, facts that you wanted me  
15 to find?  
16 ATC[CPT MORROW]: And that is when we laid those out again, Your  
17 Honor, and then explained ----  
18 MJ: Well, where are the chat logs in there?  
19 ATC[CPT MORROW]: We cited to the -- it is in the actual  
20 enclosures.  
21 MJ: You want me to use that as a supporting basis for a fact,  
22 you do not want me to ----  
23 ATC[CPT MORROW]: Exactly, it was to explain the relevance.

1 MJ: ---- oh, I thought you are asking me to take judicial  
2 notice of facts.

3 ATC[CPT MORROW]: No, not at all, Your Honor.

4 DC[CPT TOOMAN]: Your Honor, the defense's, I guess, issue with  
5 the relevance proffer from the government is the government saying,  
6 "This fact we want you to judicially notice is relevant to this other  
7 evidence that we plan to offer", without telling the Court how that  
8 other evidence is relevant. So, they are saying it is relevant to  
9 other evidence that may or may not be relevant. So that is the  
10 defense's, I guess, problem with that proffer from the government as  
11 to relevance. They have not shown the relevance for the base of  
12 whatever this other thing is relevant to, if that makes sense.

13 MJ: No, I know what you are saying.

14 ATC[CPT MORROW]: Can I just use one example here?

15 MJ: Yes.

16 ATC[CPT MORROW]: If the government is offering an adjudicative  
17 fact, for example: Julian Assange was in "this" place working on  
18 "this", and we are trying to prove that he, that Manning disclosed  
19 information to unauthorized persons, as an element of the crime, then  
20 that would be relevant to tend to prove that Manning was talking to  
21 Assange and that that is was there the disclosure was happening. I  
22 mean, I am not sure how that becomes any more clear, but we will  
23 certainly defer to the Court's judgment.

1 MJ: Anything else from either side?

2 CDC[MR. COOMBS]: No, Your Honor.

3 TC[MAJ FEIN]: No, Your Honor.

4 MJ: Any last words with respect to Ambassador Galbraith? I  
5 believe we argued that last time.

6 TC[MAJ FEIN]: No, Your Honor.

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: Okay, I am going to need about half an hour, does that work  
9 for the parties?

10 CDC[MR. COOMBS]: Yes, Your Honor.

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: All right. Now PFC Manning, we talked earlier today in the  
13 R.C.M. 802 conference, once again for everyone else, that is where I  
14 talk logistics and scheduling with counsel, and both sides advised me  
15 that they wanted to go forward tonight and finish up as opposed to  
16 recessing and starting again. Is it okay with you?

17 ACC: Yes, Your Honor.

18 MJ: All right, anything else we need to address before we  
19 recess?

20 TC[MAJ FEIN]: No, ma'am.

21 CDC[MR. COOMBS]: No, Your Honor.

22 MJ: Court is in recess.

23 **[The Article 39(a) session recessed at 1718, 16 January 2013.]**

1 [The Article 39(a) session was called to order at 1757, 16 January  
2 2013.]

3 MJ: This Article 39(a) session is called to order. Let the  
4 record reflect all parties present when the court last recessed are  
5 again present in court.

6 Mr. Coombs -- The parties and I had an R.C.M. 802  
7 conference, as I said earlier, that is when the parties discuss  
8 logistics and scheduling issues in cases and the defense, I believe,  
9 has a corrected copy on their supplement to the plea.

10 Is that correct?

11 CDC[MR. COOMBS]: That is correct, Your Honor. There are some  
12 minor changes that the government and I talked about. I am going to  
13 make those changes tonight and I will send that to both the Court and  
14 the government this evening.

15 MJ: Are they substantive changes or more just a typo-type  
16 changes?

17 CDC[MR. COOMBS]: They are not substantive changes, yeah, they  
18 are very minor changes, just an idea of removing a word that has no  
19 real effect. So, that is why we have no objection to that. We will  
20 make those changes.

21 MJ: All right. Government, anything?

22 ATC[CPT MORROW]: No, Your Honor.

1 MJ: The Court is prepared to rule both on the judicial notice  
2 motions and the motion to compel Ambassador Galbraith.

3 Government Request for Judicial Notice.

4 On 16 November 2012, the government request the Court take  
5 judicial notice of the following adjudicative facts:

6 1. Army Manual 2-0, Intelligence.

7 2. Army Field Manual 2-19.4, Brigade Combat Team  
8 Intelligence Operations.

9 3. Army Field Manual 2-22.2, Counterintelligence.

10 4. Army Field Manual 2-22.3, Human Intelligence Collector  
11 Operations.

12 5. Army Soldiers Manual and Trainer's Guide, "Soldiers  
13 Manual and Trainer's Guide for Intelligence Analyst MOS 35F Skill  
14 Level 1-2-3-4.

15 6. Executive Order 12958.

16 7. Executive Order 12972.

17 8. Executive Order 13142.

18 9. Executive Order 13292.

19 10. A 10 February 2010, *BBC news* report showing Julian  
20 Assange in Iceland.

21 11. A *New York Times* article entitled, "Pentagon sees  
22 threat from online muckrakers", by Stephanie Strom, dated 18 March  
23 2010, references Lieutenant Colonel Lee Packnett.



1           12. On 7 June 2010, the *New Yorker* published an article  
2 entitled, "No Secrets: Julian Assange's missions for total  
3 transparency".

4           13. The *Washington Post* has published online a letter  
5 purportedly from the United States Department of State Legal Advisor,  
6 Harold Koh and dated 27 November 2010m which states that the  
7 Department of State understood, "from conversations and  
8 representatives from the *New York Times*, the *Guardian*, and der  
9 *Spiegel* that WikiLeaks also has provided approximately 250,000  
10 documents to each of them for publication furthering the illegal  
11 dissemination of classified documents."

12           14. On 29 November 2010, the Armed Forces Press Service  
13 published an article in stating, "WikiLeaks released classified  
14 information over the weekend of 27 to 28 November 2010."

15           15. The United States Department of State lists al-Qaeda  
16 as a foreign terrorist organization as of 8 November 1999. It lists  
17 al-Qaeda as the Islamic Maghreb as of 27 March 2002. It lists al-  
18 Qaeda in Iraq as of 17 December 2004. It lists al-Qaeda in the  
19 Arabian Peninsula as of 19 January 2010.

20           16. The United States FBI has named Adam Yahye Gadahn as  
21 a most wanted terrorist and states he is associated with al-Qaeda.

22           17. Under a header, "Defining the Enemy", the United  
23 States Department of State has cited terrorist networks as the

1 greatest national security threat. It has also named al-Qaeda and  
2 confederated extremist groups as the greatest terrorist threat.

3 18. The United States Department of State Assistant  
4 Secretary in the Bureau of Public Affairs recites that the Department  
5 of State has designated, "al-Qaeda in the Arabian Peninsula AQAP as a  
6 foreign terrorist organization", in January 2010.

7 19. The United States Department of State Undersecretary  
8 for Management, Patrick Kennedy testified that "DoD material was  
9 leaked in July of 2010".

10 21.[sic] In the winter 2010 issue of "*Inspire*" states that  
11 "anything useful from WikiLeaks" can be archived and shared to "help  
12 the mujahedeen".

13 2. During the Article 39(a) session held 8 through 11  
14 January 2013 the government filed an addendum to its motion  
15 clarifying that the government moved the Court to consider 10 through  
16 21 as sources for the court to take judicial notice of the following  
17 adjudicative facts:

18 A) Julian Assange was located in Iceland in February 2010  
19 and working on the Icelandic Modern Media Initiative.

20 B) Lieutenant Colonel Lee Packnett was quoted in a *New*  
21 *York Times* article dated 18 March 2010.

1 C) A *New Yorker* profile of Julian Assange titled, "No  
2 Secrets: Julian Assange's mission for total transparency", was dated  
3 7 June 2010.

4 D) WikiLeaks and various news organizations began  
5 publishing Department of State (DoS) diplomatic cables over the  
6 weekend of 27 to 28 November 2010.

7 E) al-Qaeda and its affiliates, al-Qaeda in the Islamic  
8 Maghreb, al-Qaeda in Iraq, al-Qaeda in the Arabian Peninsula, are all  
9 listed as foreign terrorist organizations by the department state and  
10 are, in fact, enemies of the United States.

11 F) Osama bin Laden is a member of al-Qaeda and an enemy of  
12 the United States.

13 G) Adam Gadahn is a member of al-Qaeda and is an enemy of  
14 the United States.

15 H) *Inspire* is a magazine, it advocates violent jihad and  
16 promotes the ideology of AQAP.

17 3. On 11 January 2013, the government provided additional  
18 source information to the Court for A through H above.

19 4. On 30 June 2012, the government filed a response --  
20 excuse me, I must have the date wrong here. December 2012, defense  
21 filed a response objecting to 1 through 9 on the grounds that the  
22 government had not established relevance. During oral argument at  
23 the 8 through 11 January 2013 Article 39(a) session, the defense

1 withdrew their objections for 6 through 9. On 15 January 2013, the  
2 defense filed a response to the government addendum. The defense did  
3 not object to D.; E. in part; F.; and G. The defense objected to A.,  
4 B., C., and H. on lack of relevance; B. and C. on hearsay and the  
5 portion of H. that, "advocates violent jihad and promotes the  
6 ideology of al-Qaeda in the Arabian Peninsula", because it asks the  
7 Court to draw an inference. The defense further objects to that part  
8 of E. requesting the Court take judicial notice of al-Qaeda in the  
9 Arabian Peninsula as an enemy, because the accused allegedly gave  
10 intelligence to the enemy beginning in November 2009. The  
11 designation did not take place until 19 January 2010 which was after  
12 the alleged misconduct.

13 Defense Judicial Notice: Damage Assessments.

14 1. On 30 November 2012, the defense moved the Court take  
15 judicial notice of the Office of National Counterintelligence  
16 Executive ONCIX, Information Review Task Force IRTF and DoS damage  
17 assessments and their contents as adjudicative facts. The defense  
18 asserts the damage assessments and their contents are admissible as  
19 admissions by a party opponent under M.R.E. 801(d)(2) and as public  
20 records under M.R.E. 803(8).

21 2. The government does not object to the Court taking  
22 judicial notice of the existence of the damage assessments and that  
23 they were prepared by the relevant agency. The government argues the

1 contents of the damage assessments are not admissible under M.R.E.  
2 801(d)(2) or M.R.E. 803(8).

3 Defense Judicial Notice: Over classification, HR 553 and  
4 Congressional Hearings.

5 On 30 November 2012, the defense moved the Court take  
6 judicial notice of:

7 1. HR 553, Reducing Over Classification Act.

8 2. The House committee meetings on the Espionage Act on 16  
9 December 2010.

10 3. House committee meeting on the Over Classification Act  
11 on 22 March, 26 April and 28 June 2007.

12 On 10 January 2013, the defense provided the Court with  
13 additional supplemental authority:

14 [1.] Executive Order 13526, Section 5.1, DoD Instruction  
15 5210.5, Paragraphs 5.1.10 and 5.1.11, DoD Instruction 5240.11 and DoD  
16 Regulation 5200-1R, Chapter 10, 10-104 to consider as source material  
17 for the judicial notice motion.

18 2. On 30 November 2012, the government objected to the  
19 Court taking judicial notice of all of the above on the grounds of  
20 both lack of relevance for both merits and sentencing. The  
21 government further objects that Mr. Blanton's testimony at the  
22 congressional hearing and his testimony at the congressional meetings

1 in 2 and 3 do not consist of adjudicative facts and represent hearsay  
2 within hearsay.

3 The Law: Judicial Notice.

4 1. Military Rule of Evidence 201 governs judicial notice  
5 of adjudicative facts. The judicially noted fact must be one not  
6 subject to reasonable dispute in that it is either:

7 1) Either generally known universally, locally or in the  
8 area pertinent to the event or;

9 2) Capable of accurate and ready determination by resort to  
10 sources whose accuracy cannot be reasonably questioned, *United States*  
11 *v. Needham*, 23 MJ 383 Court of Military Appeals, 1987; *United States*  
12 *v. Brown*, 33 MJ 706, Army Court of Military Review, 1991.

13 2. M.R.E. 201(c) requires the military judge to take  
14 judicial notice of adjudicative facts if requested by a party and  
15 supplied with the necessary information.

16 3. When the military judge takes judicial notice of  
17 adjudicative facts, the fact finder is instructed that they may, but  
18 are not required to, except as conclusive any matter judicially  
19 noticed.

20 4. Judicial notices of adjudicative facts: judicial  
21 notice is not appropriate for inferences a party hopes the fact  
22 finder will draw from the facts judicially noticed. Legal arguments  
23 and conclusions are not adjudicative facts subject to judicial

1 notice, *United States v. Anderson*, 22 MJ 885, Air Force Court of  
2 Military Review, 1985, where it held appropriate to take judicial  
3 notice of the existence of a treatment program at a confinement  
4 facility but it is not appropriate to take judicial notice of the  
5 quality of the program.

6           The Law: Hearsay.

7           [1.] Hearsay is a statement other than one made by the  
8 declarant while testifying at trial, offered in evidence to prove the  
9 truth of the matter asserted, M.R.E. 801(c). Hearsay is not  
10 admissible except as provided by the Military Rules of Evidence or by  
11 any act of Congress applicable in trials by court-martial, M.R.E.  
12 802.

13           2. Admission by a party opponent: M.R.E. 801(d) (2)  
14 provides, in relevant part, that admissions by a party opponent are  
15 not hearsay if the statement is offered against a party and is:

16           a) The party's own statement in either the party's  
17 individual or representative capacity;

18           b) A statement in which the party has manifested the  
19 party's adoption or belief in the truth;

20           c) A statement by a person authorized by the party to make  
21 a statement concerning the subject;

22           d) A statement by the party's agent or servant concerning  
23 the matter -- or concerning the subject -- excuse me -- a statement

1 by the party's agent or servant concerning a matter within the scope  
2 of the agency or employment of the agent or servant during the  
3 existence of the relationship. The contents of the statement shall  
4 be considered but are not alone sufficient to establish the  
5 declarant's authority under c), or the agency or employment  
6 relationship and scope under d).

7 3. M.R.E. 803(8) public records is an exception to the  
8 hearsay rule. The rule allows for admission of records, reports or  
9 statements or data compilations in any form of public office or  
10 agency setting forth the activities:

11 a) The activities of the office or agency;

12 b) Matters observed pursuant to a duty imposed by law as to  
13 which there was a duty to report excluding, however, matters observed  
14 by police officers and other personnel acting in a law enforcement  
15 capacity; or,

16 c) Against the government, factual findings resulting from  
17 an investigation made pursuant to authority granted by law unless the  
18 sources of information or other circumstances indicate a lack of  
19 trustworthiness.

20 4. M.R.E. 805 provides that hearsay within hearsay is not  
21 excluded under the hearsay rule if each part of the combined  
22 statement conforms with an exception to the hearsay rule as provided  
23 in these rules.



1           The Law: Sentencing Defense Evidence.

2           1. R.C.M. 1001(c) governs matters to be presented by the  
3 defense during sentencing. In relevant part, the rule allows the  
4 defense to present matters in rebuttal to any material presented by  
5 the government in matters in extenuation and mitigation. Matters of  
6 extenuation serve to explain the circumstances surrounding the  
7 commission of an offense including those reasons for committing the  
8 offense which do not constitute legal justification or excuse.  
9 Matters in mitigation of the offense are reasons to lessen the  
10 punishment of an offense or furnish grounds for recommendations of  
11 clemency.

12           2. R.C.M. 1000(c) (3) authorizes the Military Judge, with  
13 respect to matters in extenuation and mitigation, or both, to relax  
14 the rules of evidence. This may include admitting letters,  
15 affidavits, certificates of military and civil officers and other  
16 writings of similar authenticity and reliability.

17           3. M.R.E. 1001(c) (4) provides that when the rules of  
18 evidence have been relaxed for the defense they may be relaxed during  
19 rebuttal or surrebuttal to the same degree.

20           Conclusions Of Law.

21           The Government Motion for Judicial Notice.

22           1. For the matters where the sole defense objection is  
23 relevance, the Court will take judicial notice of the adjudicative

1 facts subject to a demonstration of relevance by the government at  
2 trial. Thus, the remaining government judicial notice requests at  
3 issue are:

4 B. Lieutenant Colonel Lee Packnett was quoted in a *New York*  
5 *Times* article dated 18 March 2010.

6 C. A *New Yorker* profile of Julian Assange titled, "No  
7 Secrets: Julian Assange's mission for total transparency", was dated  
8 7 June 2010.

9 E. alQaeda in the Arabian Peninsula, is listed as a  
10 foreign terrorist organizations by the Department of State and is, in  
11 fact, an enemy of the United States. And,

12 H. [*Inspire* is a magazine] it advocates violent jihad and  
13 promote the ideology of AQAP. The bracketed portion has only a  
14 relevance objection.

15 2. In addition to relevance, the defense objects to B and  
16 C as hearsay, the portion of E designating al-Qaeda in the Arabian  
17 Peninsula as listed as a foreign terrorist organization by DoS and as  
18 an enemy of the United States and that portion of H stating, "it  
19 advocates violent jihad and promotes the ideology of a AQAP because  
20 the designation by DoS occurred on 19 January 2010 after the  
21 accused's alleged misconduct.

22 3. The government asserts the information the government  
23 seeks to be judicially noticed in A and B will be used by the

1 government for a nonhearsay purpose. The Court will defer ruling on  
2 whether to grant judicial notice on A and B until the government  
3 offers the evidence at trial. The Court is in a better position to  
4 make relevance hearsay determinations at that time.

5           4. The time period in the charged offenses is from on or  
6 about 9 November 2009 to on or about 27 May 2010. The designation of  
7 al-Qaeda in the Arabian Peninsula as listed as a foreign terrorist  
8 organizations by the DoS occurred on 19 January 2010, within the time  
9 period of the charged offenses. The Court will take judicial notice  
10 that al Qaeda in the Arabian Peninsula was listed as a foreign  
11 terrorist organization by the DoS on 19 January 2010 and since that  
12 date as an enemy of the United States.

13           5. The Court declines to take judicial notice of the  
14 portion of H stating, "It advocates violent jihad and promotes the  
15 ideology of AQAP." This statement requires the court to draw an  
16 inference. Any inferences, linkages, argument and legal conclusions  
17 to be gleaned by the damage -- by the information judicially noticed  
18 are appropriately presented to the fact finder by the parties, not  
19 the court.

20           The Defense Motion for Judicial Notice: Damage  
21 Assessments.

22           1. The Court finds the damage assessments and their  
23 contents, to include the draft DoS damage assessment, to be

1 admissible as public records under M.R.E. 803(8). The government has  
2 not challenged their authenticity. By the Court taking judicial  
3 notice of the damage assessments, the defense does not have to  
4 provide further evidence of authentication.

5           2. The Court held on 19 July 2012 and 13 January 2013 that  
6 evidence of actual damage, to include damage assessments, is not  
7 relevant during the merits portion of the trial.

8           3. Should there be sentencing proceedings in this case,  
9 the Court will take judicial notice of the existence of the damage  
10 assessment, that each was created were compiled by ONCIX, IRTE, and  
11 DoS, and the dates they were created or compiled. The Court will  
12 take judicial notice of the DoS damage assessment as the most current  
13 damage assessment prepared by DoS and that it is a draft.

14           4. The contents of the damage assessments are not  
15 adjudicative facts. Any inferences, linkages, argument or legal  
16 conclusions to be gleaned from the damage assessments are  
17 appropriately presented to the fact finder by the parties, not the  
18 court.

19           Defense Motion for Judicial Notice: HR 553 and  
20 Congressional Hearings Discussing Classification.

21           1. The Court has before it the government motion to  
22 preclude evidence of over classification and the defense motion to

1 take judicial notice of HR 553 and congressional hearings discussing  
2 classification.

3           2. Both motions are related. The Court takes them under  
4 advisement and will issue a supplemental ruling regarding the use of  
5 over classification on the merits and/or sentencing and the defense  
6 request for judicial notice regarding over classification.

7           Ruling: The government and defense motions for judicial  
8 notice are granted in part as set forth above.

9           1. The Court will take judicial notice of the following  
10 adjudicative facts for the government: 6 through 9; D; E as modified  
11 to add the date of designation by DoS as 19 January 2010; 1 through  
12 6; A and that portion of H, upon a determination of relevance; B and  
13 C, upon a demonstration of relevance and use as nonhearsay or as  
14 hearsay exceptions.

15           2. The Court will take judicial notice of the following  
16 adjudicative facts for the defense during the sentencing phase of the  
17 trial: existence of the damage assessments, that each one was  
18 created or compiled by ONCIX, IRTF and DoS and the dates they were  
19 created or compiled. The Court will take judicial notice that DoS  
20 damage assessment is the most current damage assessment prepared by  
21 DoS and that it is a draft.

22           3. The Court takes the defense motion for judicial notice  
23 of HR 553 and congressional hearings discussing classification under

1 advisement with the government motion to preclude evidence of over  
2 classification and will issue a supplemental ruling on both matters.

3           So ordered this 16th day of January 2013.

4           Does either side have anything further with respect to the  
5 motions for judicial notice?

6           CDC[MR. COOMBS]: No, Your Honor.

7           ATC[CPT MORROW]: No, Your Honor.

8           MJ: Okay. Finally, the Court is prepared to rule on the  
9 defense motion to compel witnesses: Ambassador Galbraith.

10           On 23 November 2012 the defense moved to compel production  
11 of Ambassador Galbraith as a sentencing witness. On 12 December 2012  
12 the government filed a motion opposing production of Ambassador  
13 Galbraith. On 4 January 2013, the defense filed proffers in support  
14 of its motion to include a 3 January 2013 declaration from Ambassador  
15 Galbraith. Having considered the filings by the parties, oral  
16 argument and Ambassador Galbraith's declarations, the Court finds and  
17 rules as follows:

18           1. Ambassador Galbraith served as Ambassador to Croatia  
19 from 1993 to 1998. He was an original classification authority, OCA.  
20 Prior to this, he served as a staff member of the Senate Foreign  
21 Relations Committee from 1979 to 1993. For 10 years during this  
22 period, he was responsible for the DoS authorizing legislation to

1 include responsibility for oversight and legislation related to the  
2 DoS handling of classified information:

3           2. SIPDIS was not used while Ambassador Galbraith was at  
4 DoS but he or his staff drafted some of the cables that subsequently  
5 received the SIPDIS label.

6           3. The government is calling a number of witnesses from  
7 the DoS for the sentencing phase of the trial. The defense does not  
8 have easy access to witnesses currently employed at DoS.

9           4. The government response concedes that although dated,  
10 Ambassador Galbraith's testimony could be relevant for sentencing.

11           5. R.C.M. 703(c)(2)(B)(i) provides that the defense must  
12 present, in addition to providing witness list, the defense's  
13 synopsis of expected testimony must list the subject of the witnesses  
14 is expected to address and what the witnesses would say about that  
15 subject, *United States v. Rockwood*, 52 MJ 98, Court of Appeals for  
16 the Armed Forces 1999. The defense has met this requirement.

17           6. Although Ambassador Galbraith's experience at DoS is  
18 15-years old and he does not have direct experience with SIPDIS, he  
19 does have some experience with some of the cables at issue in this  
20 case and as a DoS OCA and with legislation involving classification  
21 by DoS. In light of the number of government witnesses testifying  
22 during sentencing, that would be DoS government witnesses testifying  
23 during sentencing, and the lack of ready access to such witnesses by

1 the defense, the Court order the government to produce Ambassador  
2 Galbraith as a defense witness for sentencing.

3 Ruling:

4 The defense motion to compel production of Ambassador  
5 Galbraith is granted.

6 So ordered this 16th day of January 2013.

7 Is there anything else we need to address today?

8 CDC[MR. COOMBS]: No, Your Honor.

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: Okay, so we are effectively in recess until the 27th of  
11 February -- or the 26th of February, excuse me, of 2013, is that  
12 correct?

13 TC[MAJ FEIN]: Yes, ma'am, at 0930, the same time?

14 MJ: 0930.

15 CDC[MR. COOMBS]: Yes, Your Honor.

16 MJ: All right, court is in recess.

17 [The Article 39(a) session recessed at 1819, 16 January 2013.]

18 [END OF PAGE]



1 [The Article 39(a) session was called to order at 1006, 26 February 2013.]

2 MJ: This Article 39(a) session is called to order.

3 Trial Counsel, please account for the parties.

4 TC[MAJ FEIN]: Ma'am, all parties when the court last recessed  
5 are again present with the following exceptions: Captain Whyte is  
6 absent; Captain Overgaard is present; Mr. Robertshaw, court reporter,  
7 is absent; Mr. Chavez, court reporter, is present.

8 MJ: Thank you. Before we go over issues that have arisen since  
9 the last Article 39(a) session, I just want to announce for the  
10 record sort of the order of march that we're going to go through in  
11 this Article 39(a) session.

12 Today we are going to first of all go over the things that  
13 have occurred since the last session. The Court is going to be  
14 prepared to announce its speedy trial ruling. We are also going to  
15 go over the relevance of the information that the government has  
16 submitted in the 505(i) motion. I believe that will -- and any  
17 issues that the government has raised with respect to the accused's  
18 proposed plea. Then tomorrow we will -- the Court will be prepared  
19 to announce its over classification ruling and we will address the  
20 potential trial closure issues *United States v. Grunden* trial closure  
21 motion that has been filed by the government.

1           On Thursday we will -- the Court will take the accused's  
2 plea. After that the Court will address the M.R.E. 505(i) actual in  
3 camera session.

4           That was discussed with the parties at the R.C.M. 802  
5 conference that was held just prior to coming on the record today.  
6 Once again, that's when the parties and the Court meet to discuss  
7 scheduling and other logistic issues that arise in cases.

8           Does either side have anything further to add to what was  
9 discussed in the R.C.M. 802 session?

10          TC[MAJ FEIN]: No, Your Honor.

11          CDC[MR. COOMBS]: No, Your Honor.

12          MJ: Government, would you like to -- well, before you begin,  
13 let me just put on the record that -- well, the government had filed  
14 a motion on the 5th of February for leave of the Court until 14  
15 February to submit its proposed providence inquiry questions and the  
16 defense objected to that via e-mail on the 5th of February 2013.

17          Has the government had its motion marked?

18          TC[MAJ FEIN]: Yes, ma'am. The government's motion is marked as  
19 Appellate Exhibit 482 and the defense's objection, the e-mail, has  
20 been marked as Appellate Exhibit 483.

21          MJ: All right. Has the Court's ruling been marked yet?

22          TC[MAJ FEIN]: Yes, ma'am. The Court's ruling is marked as  
23 Appellate Exhibit 484.

1 MJ: Just for the record, the Court ruled -- the Court has  
2 considered the government's 5 February 2013, Motion for Leave of the  
3 Court until 14 February 2013, to submit its proposed providence  
4 inquiry questions and the defense objection submitted to the court  
5 via e-mail on 5 February 2013. Although not in the title of the  
6 motion, the government infers there are legal issues involved with  
7 the defense proposals.

8 Ruling: The government motion for leave until 14 February  
9 2013, is granted in part as set forth below:

10 One, the government will submit proposed providence inquiry  
11 questions no later than 7 February 2013;

12 Two, any government filing addressing legal issues raised  
13 by the accused's proposed providence inquiry and plea will be  
14 submitted no later than 14 February 2013;

15 Three, any defense response to legal issues raised by the  
16 government will be submitted no later than 21 February 2013.

17 Now, have the -- for the record, have the proposed legal  
18 issues been filed by the government?

19 TC[MAJ FEIN]: Yes, Your Honor, they have. They have not been  
20 marked.

21 MJ: All right. So we will await -- we'll wait until we get to  
22 that session before we go ahead and mark the filings.

1 All right. Major Fein, why don't you go ahead with what  
2 has occurred since the last session?

3 TC[MAJ FEIN]: Yes, ma'am. Ma'am, on the 31st of January 2013,  
4 the government filed an *ex parte* notice to the Court, a disclosure  
5 that's been marked as Appellate Exhibit 474, unclassified.

6 On the 31st of January, the same date, 2013, the government  
7 filed a *Grunden* response via SIPRNET that's been marked as Appellate  
8 Exhibit 479, that will be subject to the hearing later this week.  
9 Then an updated *Grunden* response via SIPRNET on the 1st of February  
10 of this year, which is also the same marking. Excuse me, Your Honor,  
11 the original filing was not marked, just the subsequent filing. That  
12 was because of an administrative mistake by the prosecution with the  
13 signature block.

14 On the 31st of January 2013, an unclassified and redacted  
15 version was filed via e-mail and similarly an updated one with a  
16 different signature block on the 1st of February 2013. That has been  
17 marked as Appellate Exhibit 480.

18 On the 31st of January 2013, the government filed via  
19 SIPRNET its M.R.E. 505(i)(2) motion. It's been marked as Appellate  
20 Exhibit 477 and an unclassified redacted version of the same. It has  
21 been marked as Appellate Exhibit 478. The defense filed a response  
22 to the government's motion on the 8th of February 2013, and that has  
23 been marked as Appellate Exhibit 485. Then the government filed

1 response or a reply to the defense's response on the 14th of February  
2 2013, and that has been marked as Appellate Exhibit 488.

3 Your Honor, back on the 31st of January 2013, the  
4 government also filed via SIPRNET the Government's Witness List  
5 Number Four and that has been marked as Appellate Exhibit 475 and  
6 then an unclassified and redacted version of the same and it's been  
7 marked as Appellate Exhibit 476.

8 Your Honor, on the 8th of February 2013, the government  
9 filed its plan or proposed plan, excuse me, for storage of Appellate  
10 Exhibit that has been marked as Appellate Exhibit 486. Then on the  
11 20th of February 2013, the government filed a corrected copy of the  
12 same motion and that was replaced in the record as Appellate Exhibit  
13 486.

14 MJ: All right. Before you go on any further, with the storage  
15 of Appellate Exhibits not accompanying the record of trial, does the  
16 defense have any objections to what the government has proposed?

17 CDC[MR. COOMBS]: No, Your Honor.

18 MJ: All right. And the Court has the government's proposed  
19 order. There's a few changes I'm going to make to it, so we will  
20 finalize that order and announce it later in the day.

21 TC[MAJ FEIN]: Yes, ma'am. Ma'am, would the Court like the  
22 government to summarize the proposed plan?

23 MJ: Yes.

1 TC[MAJ FEIN]: Ma'am, based off of different types and forms of  
2 classified information that has been used so far in this trial since  
3 the case has been referred, there has been certain classes of  
4 documents that have required the Court, prosecution and defense to  
5 travel to different government organizations to review the documents  
6 based off of the classifications and control measures. Based off of  
7 that the United States Army Court of Appeals Clerk's Office does not  
8 have a facility that is adequate to store this type of classified  
9 information, so the government has, based off the direction of the  
10 Court, found a single location at a government organization that will  
11 house all of these documents and has worked with each of the equity  
12 holder organizations to receive their approval to take their  
13 organization's documents and consolidate them into one location.  
14 What this proposal captures is that consolidation, where it will be  
15 stored and the different type of accountability measures that will be  
16 put in place in both at the Military District of Washington and the  
17 Clerk's office at the Army Court of Criminal Appeals.

18 This plan, prior to the government submitting it to the  
19 Court, has been approved by all the equity holders and has been  
20 approved by the clerk of court.

21 MJ: All right. Thank you. Major Fein, was there a new  
22 convening order in this case?

23 TC[MAJ FEIN]: Say again, ma'am?

1 MJ: Was there a new convening order in this case?

2 TC[MAJ FEIN]: Yes, ma'am, there is and there are additional  
3 filings since then as well.

4 Ma'am, on the 11th of February 2013, the General Court-  
5 Martial Convening Authority selected a new panel and issued a new  
6 Court-Martial Convening Order Number 1. This is again dated 11  
7 February 2013, and specifically -- or expressly stated in this order  
8 all cases referred to the general court-martial convened by Court-  
9 Martial Convening Order Number 2, this Headquarters, dated 22  
10 February 2012, which was the current convening order that this court  
11 was operating under prior to this date, in which the court has not  
12 yet been assembled are hereby referred to the General Court-Martial  
13 convened by this order. So CMC0 1, 2013, is the current convening  
14 order.

15 Your Honor, on 14 February 2013, the government notified  
16 the defense and Court on a status update of the security clearances  
17 requested by the defense. This has been marked as Appellate Exhibit  
18 487. This is pursuant to the government's agreement with the defense  
19 that it will process security clearances for Ambassador Galbraith;  
20 Colonel Davis, U.S. Air Force retired; and Professor Benkler. The  
21 update consisted of the United States Army -- excuse me, Your Honor.  
22 Essentially, Your Honor, the United States Army has approved security  
23 clearances for limited access to all three individuals, and now the

1 government is just ensuring that those that are actually receiving  
2 clearances are filling out the proper paperwork in order to process  
3 those clearances -- excuse, approval to apply for a clearance, that  
4 they're processing them and for the limited access, the prosecution  
5 is coordinating with the individual equity holders at the next step  
6 to grant the access. At this point, Your Honor, and as of 14  
7 February, the United States does not anticipate any issues with these  
8 individuals receiving access to what the defense is requesting.

9 MJ: In time for trial?

10 TC[MAJ FEIN]: In time. More than that, Your Honor, by the  
11 Court's suspense of 22 April 2013.

12 MJ: Any issues from the defense?

13 CDC[MR. COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: Your Honor ----

15 MJ: Major Fein, let me just ask you something.

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: With the new Court-Martial Convening Order and new  
18 potential members and alternate members, was there a pretrial  
19 publicity order proposed by the government?

20 TC[MAJ FEIN]: Yes, ma'am. On the 14th of February 2013, the  
21 government drafted a new pretrial publicity order for the new panel  
22 members that were selected. That has not been marked yet, Your  
23 Honor. It has been submitted to the Court in order to be -- excuse



1 me, Your Honor. The Court has marked it and I do not know the  
2 Appellate Exhibit number of that.

3 MJ: I believe it is Appellate Exhibit 493.

4 TC[MAJ FEIN]: May I have a moment, Your Honor?

5 MJ: Yes.

6 [Pause.]

7 TC[MAJ FEIN]: Yes, ma'am. Immediately prior to this session  
8 the Court signed, dated today, 26 February 2013, Appellate Exhibit  
9 493, which is the government's proposed order for the new panel  
10 members.

11 MJ: All right. Was there any objection to that order from the  
12 defense?

13 CDC[MR. COOMBS]: No, Your Honor.

14 MJ: Just for the record what the order states is it's a  
15 Pretrial Publicity Order to Court-Martial Members. There was already  
16 a prior pretrial publicity order in this case and this supplements  
17 it. It's dated 26 February 2013. To all prospective court members  
18 for the above captioned court-martial, that's *United States v.*  
19 *Manning*:

20 One, this case has been referred to trial by general court-  
21 martial and is scheduled for trial on June 3rd, 2013, until complete.  
22 The trial is expected to last approximately 12 weeks. You will be  
23 contacted by the Office of the Staff Judge Advocate, United States

1 Army, Military District of Washington if you are detailed to be a  
2 member for this case. This order is being provided to all persons  
3 who are presently identifiable as potential court members.

4 Two, the Court finds that there has been pretrial publicity  
5 in the above captioned court-martial to an extent that the following  
6 order is necessary and proper in aid of its jurisdiction and in the  
7 interest of the fair administration of justice and due process of law  
8 for all the parties.

9 Three, all prospective court members are ordered as  
10 follows:

11 A. Due to the prior publicity and the probability for  
12 more publicity in the news media, newspapers, magazines, radio  
13 coverage, television coverage, internet news and editorial sources,  
14 including the Early Bird e-mail, et cetera about this case you are  
15 ordered not to listen to, look at or read any accounts of any  
16 incident involved in the above named accused or concerning  
17 allegations of compromise of classified information or the ongoing  
18 issues involving the publication of alleged classified information by  
19 Wiki-Leaks. You may not consult any source written or otherwise  
20 involved in the alleged incident. Should anyone attempt to discuss  
21 this case with you or talk to you about your potential or actual  
22 participation as a court member in this case other than in open

1 court, you must immediately forbid them from doing so and then you  
2 must report the occurrence to me in court at your first opportunity.

3           B. A trial by court-martial includes the right of an  
4 accused to be tried by a court composed of members. Court members  
5 fulfill duties similar to that of civilian jurors. As a prospective  
6 court member of a court-martial that will try this case, it will be  
7 your duty to determine the guilt or innocence of the accused as to  
8 the charges upon which he is arraigned. Under the law the accused is  
9 presumed to be innocent of the charges against him. Neither the fact  
10 that charges have been preferred against this accused nor the fact  
11 that charges have been referred to a court-martial for trial warrants  
12 any inference of guilt. Your determination of the guilt or innocence  
13 of the accused must be based solely on the evidence and my  
14 instructions in the case in open court -- present in open court. You  
15 must not read or otherwise expose yourself to information about the  
16 facts or issues in this case from sources outside the courtroom. As  
17 a potential court member you must keep an open mind and not form or  
18 express any opinion on the case until the evidence and the  
19 instructions on the applicable law have been presented to you. You  
20 must entertain or reach a conclusion as to the guilt or innocence of  
21 the accused until after all the evidence and instructions have been  
22 received in open court and you are in your closed session  
23 deliberations with other members.

1           C. The accused and the government are each entitled to a  
2 panel of court members who approach the case with an open mind and  
3 who are able to keep that open mind until they deliberate on the  
4 verdict. You should be as free as humanly possible from any  
5 preconceived ideas about the outcome of the case; therefore, you're  
6 ordered that from the date of receipt of this order until the trial  
7 is completed or until you are specifically advised by the Court that  
8 this order no longer applies to you, you will not discuss the facts  
9 of this case or any publicity concerning this case with anyone  
10 military or civilian. You may not discuss your prospective detailing  
11 to this court-martial with anyone other than as required to inform  
12 your superiors as to your duty status.

13           D. In the event you've already seen -- read, seen or  
14 listened to any news media accounts, publicity or other accounts  
15 concerning this case or you inadvertently do so before the conclusion  
16 of this court-martial, you're advised you have a legal duty to  
17 disclose that matter to me when asked in open court. Also, in the  
18 event that you've already discussed or listened to anyone else  
19 discuss any matter related to this case or inadvertently do so before  
20 the conclusion of the court-martial, you have a duty to disclose that  
21 to me in open court. You're advised it's not an adverse reflection  
22 on you to be excused from duty as a court member; however, as a  
23 member of the military, you're required to follow the instructions in

1 this order and not intentionally do anything contrary to the  
2 requirements of this order.

3           Four, this order is not intended to limit or restrict any  
4 official purpose for remaining informed regarding matters related to  
5 this case or involving the publication of alleged classified material  
6 by WikiLeaks. If you're already presently assigned to a position  
7 that requires your ongoing access to such information and you cannot  
8 reasonably remove yourself from that position -- from that portion of  
9 your duties without adversely impacting you or your mission, then you  
10 shall obtain a memorandum from your supervisor documenting your  
11 continued requirement for access. Provide that memorandum to the  
12 Office of the Staff Advocate, U.S. Army, Military District of  
13 Washington, and your authorized continued access to this information  
14 for the limited purpose of performing your official military duty.

15           Five, the trial counsel shall cause a copy of this order to  
16 be served through the Office of the Staff Judge Advocate, Military  
17 District of Washington, on each prospective primary and alternate  
18 member of the Court. If the Convening Authority selects any  
19 additional primary or alternate member after the date of this order,  
20 the trial counsel shall immediately cause a copy of this order to be  
21 served on the new primary or alternate member.

22           Trial counsel shall obtain and maintain a written list --  
23 receipt of such service using the form provided along with this order

1 showing the date and time of this order was served on each  
2 prospective member. A copy of this service shall be given to the  
3 defense. Trial counsel will attach receipts for service on the  
4 record as an Appellate Exhibit.

5 Ordered this 26 day of February, 2013.

6 That's Appellate Exhibit 493.

7 Yes, Major Fein?

8 TC[MAJ FEIN]: I was just going to continue, ma'am.

9 MJ: Go ahead.

10 TC[MAJ FEIN]: Ma'am, additionally on the 22nd of February 2013,  
11 the defense filed an M.R.E 505(h) notice that's been marked as an  
12 appellate exhibit. It's classified. It's been marked as Appellate  
13 Exhibit 490. The government, as discussed earlier with the defense,  
14 intends this week before the close of this motions hearing to review  
15 that and work with the defense to determine if there's any more  
16 information needed by the government to process it.

17 Also, ma'am, during an accounting of the appellate record  
18 it was realized that one Appellate Exhibit had not been marked, that  
19 is a defense M.R.E. 505(h) filing from the 5th of November 2012.  
20 That has been marked. It was a classified filing as well. It has  
21 been marked as Appellate Exhibit 491.

22 Finally, Your Honor, marked today or dated today, 26  
23 February 2013, defense request for trial by military judge alone

1 that's been marked as Appellate Exhibit 492, which will be discussed  
2 by the defense later.

3 MJ: All right. Mr. Coombs, are there any additional exhibits  
4 that have been marked by the defense?

5 CDC[MR. COOMBS]: Yes, Your Honor, just a stipulation of  
6 expected testimony for a Fort Leavenworth witness.

7 MJ: All right.

8 CDC[MR. COOMBS]: That's been marked as Defense Exhibit Bravo  
9 for Identification.

10 MJ: Government, do you have any objections to Defense Exhibit  
11 Bravo?

12 ATC[CPT OVERGAARD]: No, ma'am.

13 MJ: All right. PFC Manning, do you have a copy of Defense  
14 Exhibit Bravo before you?

15 ACC: Yes, Your Honor.

16 MJ: Is that your signature there on Page 2 on the bottom?

17 ACC: Yes, Your Honor.

18 MJ: Did you read the stipulation of expected testimony before  
19 you signed Page 2?

20 ACC: Yes, Your Honor.

21 MJ: Do you understand the contents of the stipulation?

22 ACC: Yes, Your Honor.

23 MJ: Do you agree with the contents of the stipulation?

1 ACC: I do, Your Honor.

2 MJ: Before signing this stipulation, did your defense counsel  
3 explain the stipulation to you?

4 ACC: Yes, Your Honor.

5 MJ: Do you understand you have an absolute right to refuse to  
6 stipulate to the contents of any document?

7 ACC: Yes, Your Honor.

8 MJ: You should enter into this stipulation only if you believe  
9 it's in your best interest to do that. Do you understand?

10 ACC: Yes, Your Honor.

11 MJ: I want to ensure that you understand exactly how this  
12 stipulation is going to be used. When counsel for both sides and you  
13 agree to a stipulation of expected testimony, you're agreeing that if  
14 a Fort Leavenworth witness was testifying here in court and was  
15 present here in court, he or she would testify substantially as set  
16 forth in this stipulation. The stipulation does not admit the truth  
17 of the person's testimony. It can be contradicted, attacked or  
18 explained in the same way as if the person was here in court  
19 testifying. Do you understand that?

20 ACC: Yes, Your Honor.

21 MJ: Knowing what I've told you and what your defense counsel  
22 told you earlier about this stipulation, do you still desire to enter  
23 into this stipulation?



1 ACC: Yes, Your Honor.

2 MJ: Do counsel for both sides agree?

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 ATC[CPT OVERGAARD]: Yes, ma'am.

5 MJ: Defense Exhibit Bravo for Identification is admitted as  
6 Defense Exhibit Bravo.

7 Are there any other issues that we need to address before I  
8 announce the speedy trial ruling?

9 TC[MAJ FEIN]: No, Your Honor.

10 CDC[MR. COOMBS]: No, Your Honor.

11 MJ: All right. The Court is going to need about a 20 minute  
12 recess. Why don't we reconvene at a quarter to 11?

13 Court is in recess.

14 **[The Article 39(a) session recessed at 1027, 26 February 2013.]**

15 **[The Article 39(a) session was called to order at 1054, 26 February**  
16 **2013.]**

17 MJ: This Article 39(a) session is called to order. Let the  
18 record reflect all parties present when the court last recessed are  
19 again present in court.

20 The Court is prepared to announce its speedy trial ruling,  
21 dated 26 February 2013.

22 The defense has moved to dismiss all charges and their  
23 specifications for a violation of the accused's right to a speedy

1 trial under Article 10 UCMJ, R.C.M. 707 and the Sixth Amendment to  
2 the Constitution of the United States. The Court has considered the  
3 filings by the parties, the witnesses and the evidence presented in  
4 oral argument.

5 The Court finds and rules as follows:

6 Findings of fact general: The Court adopts the stipulated  
7 chronology submitted by the parties with the modifications and  
8 additional chronology entries at Attachment 1 to this ruling.

9 Two, the Court further adopts the findings of fact and  
10 conclusions of law from the Article 13 ruling, Appellate Exhibit 461.  
11 The Court takes judicial notice of the Appellate Exhibits and the  
12 case schedules that have been filed, 25 April 2012 schedule, 30  
13 August 2012 schedule, 18 October 2012 schedule, 8 November 2012  
14 schedule, 20 December 2012 schedule, and 9 January 2013 schedule.  
15 Every trial schedule was coordinated between the Court and the  
16 parties and implemented with the consent of both parties.

17 R.C.M. 707 timeline. The accused was restrained for R.C.M.  
18 707 analysis on 27 May 2010. Charges were referred to trial on 3  
19 February 2012. The Court received the referred charges on 3 February  
20 2012. The accused was arraigned on 23 February 2012. The time  
21 period between 28 May 2010 and 23 February 2012, is 637 days.

22 The parties stipulate that the following 84 days count  
23 against the R.C.M. 707 120 day speedy trial clock: 28 May 2010 to 11

1 July 2010, 45 days; 16 December 2011 to 23 December 2011, 8 days; 9  
2 January 2012 to 3 February 2012, 26 days; 23 February 2012, 1 day.

3           The defense concedes the following 220 days were properly  
4 excluded: 11 August 2010 to 3 March 2011, 205 days; 8 to 22 February  
5 2012, 15 days. In its motion defense included the period between 4  
6 and 22 February 2012 to count towards the R.C.M. 707 120 clock. At  
7 oral argument the defense conceded the period between the date of the  
8 telephonic R.C.M. 802 conference between the parties and the Court to  
9 set the arraignment, 8 February 2012, until the day prior to  
10 arraignment 22 February 2012, are excludable delay with defense  
11 consent.

12           The remaining 333 days includes the following disputed time  
13 periods: 12 July to 10 August 2010, 30 days; 4 March 2011 to 15  
14 December 2011, 287 days; 24 December 2011 to 2 January 2012, 10 days;  
15 and 7 through 8 January 2012, 2 days; 4 February through 7 February  
16 2012, 4 days.

17           R.C.M. 707 -- The law. R.C.M. 707(a) requires in relevant  
18 part that an accused be brought to trial within 120 days after  
19 imposition of restraint under R.C.M. 304(a)2 through 4. "Brought to  
20 trial" means the date of arraignment. The date of imposition of  
21 restraint does not count; however, the date of arraignment does  
22 count.

1           Before a case is referred requests for pretrial delay  
2 together with supporting reasons are submitted to the Convening  
3 Authority for decision. After referral request for delay are  
4 submitted to the military judge for resolution. All pretrial delay  
5 approved by a military judge or the Convening Authority is excluded  
6 from the 120-day period. The Convening Authority may delegate to an  
7 Article 32 Investigating Officer (IO) authority to grant excludable  
8 delay. The decision to grant or deny excludable delay is within the  
9 sole discretion of the Convening Authority, military judge or Article  
10 32 IO with delegated authority to grant delay.

11           The decision -- the discussion to R.C.M. 707(b)(1) proposes  
12 examples of appropriate reasons to grant delay including the need for  
13 time to enable counsel to prepare for trial and complex cases; time  
14 to allow examination into the mental capacity of the accused; time to  
15 complete other proceedings related to the case; time requested by the  
16 defense; time to secure the availability of the accused; witnesses or  
17 other evidence; time to obtain appropriate security clearances for  
18 access to classified information or time to declassify evidence or  
19 other good cause.

20           The discussion further provides that pretrial delays should  
21 not be granted *ex parte* and where practicable the decision to grant  
22 the delay together with the supporting reasons and dates covering the  
23 delay should be reduced to writing.

1           Pretrial delay may be excluded after the delay occurs:  
2   *United States v. Thompson* 46 M.J. 472, Court of Appeals for the Armed  
3   Forces 1997.

4           Approved pretrial delays by a Convening Authority, Article  
5   32 IO with delegated authority or a military judge are excluded from  
6   the 120 time unless the person who granted the delay abused his or  
7   her discretion: *United States v. Lazauskas* 62 M.J. 39 at 41, Court  
8   of Appeals for the Armed Forces 2005.

9           The authority granting the delay must make an independent  
10   determination as to whether there is good cause for a pretrial delay  
11   and grant the delay for only so long as necessary under the  
12   circumstances: *Thompson* at 475.

13           The issue is not which party is responsible for the delay,  
14   but whether the decision to grant it was an abuse of discretion.  
15   There must be a causal connection between the cited justification or  
16   unusual event and the delay. Normal recurring events, which happen  
17   in almost every trial, are not excludable: *United States v. Duncan*  
18   34 M.J. 1232 and at 1343 Army Court of Military Review 1992, citing  
19   *United States v. Longhofer* 29 M.J. 22 at 27 Court of Military Appeals  
20   1989.

21           A blanket exclusion of time not tied to a specific event or  
22   events is an abuse of discretion: *United States v. Ralph* 2003,  
23   *Westlaw* 828986, Air Force Court of Criminal Appeals 2003.

1           An accused cannot be responsible for or agreeable to delay  
2 and later demand dismissal for violation of speedy trial for that  
3 same delay: *United States v. King* 30 M.J. 59, Court of Military  
4 Appeals, 1990; *United States v. McCullough* 60 M.J. 580, Army Court of  
5 Criminal Appeals, 2004.

6           The Rules of Practice for Army Courts-Martial, 15 September  
7 2009, in effect on 23 February 2012, when the accused was arraigned  
8 provided that any period of delay from the military judge's receipt  
9 of referred charges until arraignment is considered pretrial delay  
10 approved by the judge unless the judge specifies to the contrary:  
11 Rule 1.1.

12           R.C.M. 707, Findings of Fact and Conclusions of Law of  
13 Disputed Time Periods:

14           One, 12 July 2010 to 10 August 2010: 30 days. Findings of  
15 fact. The accused was placed in pretrial confinement on 29 May 2010,  
16 and transferred to TFCF on 31 May 2010.

17           In June 2010, the accused was growing increasingly mentally  
18 unstable culminating in the 30 June 2010, incident where the accused  
19 was placed in maximum custody, administrative segregation, one-on-one  
20 suicide watch.

21           On 4 July 2010, the Commander, 3rd ARCENT, ordered the  
22 accused transferred from TFCF when an appropriate facility with  
23 adequate mental health resources would accept him.

1           On 11 July 2010, the defense requested an R.C.M. 706  
2 Inquiry into the mental capacity or mental responsibility of the  
3 accused and a delay of the Article 32 Investigation then scheduled to  
4 be held on 14 July 2010. On 11 July 2010, the Article 32  
5 Investigating Officer (IO) denied the R.C.M. 706 request.

6           On 12 July 2010, the defense requested delay of the Article  
7 32 Investigation until the R.C.M. 706 board was complete and until  
8 the accused could resolve issues related to retaining civilian  
9 counsel (CDC), civilian defense counsel and defense expert witnesses.

10           On 12 July 2010, the Iraq Special Court-Martial Convening  
11 Authority granted the defense request for delay until 16 August 2010.

12           From 12 to 21 July 2010, Iraq trial counsel were  
13 coordinating the transfer of the accused out of the deployment  
14 theatre and coordinating up the chain of command to locate potential  
15 R.C.M. 706 board members.

16           Ultimately on 28 July 2010, before the R.C.M. 706 board  
17 could be appointed, jurisdiction of the case was transferred to the  
18 Military District of Washington, and the accused was transferred to  
19 Marine Corps Brig Quantico (MCBQ).

20           On 25 August 2010, Mr. Coombs notified the government that  
21 the accused retained him as civilian defense counsel.

22           Conclusions of law: The 12 July 2010, decision by the Iraq  
23 Special Court-Martial Convening Authority to grant the defense

1 request for delay until 16 August 2010, was not an abuse of  
2 discretion. The delay was directly related to the need to transfer  
3 the accused out of the deployed theatre to a more established  
4 confinement facility where adequate mental health assets were  
5 available.

6 Defense further requested the delay to allow the accused  
7 time to make decisions about retaining civilian counsel. His  
8 decision was not made and communicated to the government until 25  
9 August 2010. The time is excludable under R.C.M. 707(c).

10 Two, 24 December 2011 to 2 January 2012, 7 January 2012 to  
11 8 January 2012, 10 days and 2 days.

12 Findings of Fact: The military judge from the U.S. Army  
13 Reserves was appointed as the IO to conduct the Article 32  
14 Investigation. The Article 32 Investigation was conducted from 12  
15 December 2011 through 11 January 2012. During that time the IO was  
16 on active duty orders, from 12 December through 23 December 2011 and  
17 from 3 January to 6 January 2012. Other active duty status for pay  
18 was performed from 9 January 2012 to 11 January 2012.

19 In the 16 November order to restart the Article 32, the  
20 Special Court-Martial Convening Authority gave the IO as suspense of  
21 60 days, on or about 16 January 2012, to complete the Article 32  
22 Investigation.



Two, during this period the IO excused two periods of delay pursuant to R.C.M. 707(c) at the request of the government. The first period of delay ran from 24 December 2011 through 2 January 2012. The IO testified that he excluded the periods from 24 December through 26 December 2011 and 31 December 2011 through 2 January 2012, because they were holiday periods and appropriate personnel were not available to monitor review of classified information in the case. However, the IO testified that the periods of delay from 27 to 30 December 2011, was attributed to civilian work conflict rather than conflict with federal holidays.

Three, the second period of delay excluded by the IO was 7 through 8 January 2012. For that period of delay the IO testified that he did not perform work because he took his son to a swim meet in Pennsylvania.

Four, the IO did not request input from the defense prior to granting the delays.

Conclusions of law: One, the period of excludable delay occurred during the holidays where offices containing classified evidence required for review as part of the investigation were closed or appropriate personnel at those offices necessary for review were unavailable, and are reasonable delay under R.C.M. 707(c) and applicable case law. Those periods include the delay between 24 and

1 26 December 2011, and the period from 31 December 2011 to 2 January  
2 2012. These 6 days were properly excluded under R.C.M. 707(c).

3 Two, the periods of delay from 27 to 30 December 2012 [sic]  
4 and 7 through 8 January 2012; however, do not meet the good cause  
5 requirement and constitute an abuse of discretion. In both of those  
6 cases the delays were based on purely personal circumstances,  
7 civilian work for the first period and personal travel for the second  
8 period, rather than inability to access necessary facilities or  
9 evidence. Furthermore, the IO's determinations were made *ex post*  
10 *facto* and not in a manner to permit the defense to timely oppose the  
11 grant of delay.

12 The IO testified at the Article 39(a) session that he  
13 drafted a memorandum regarding excludable delay at the government's  
14 request and did not consider the defense's position as to whether or  
15 not the time should be excluded. In his excludable delay memorandum,  
16 dated 11 January 2012, the IO cited as his sole reason for exclusion  
17 of time federal holidays or weekend days. The memorandum for period  
18 of 23 December 2011 to 3 January 2012, is dated 4 January 2012 and a  
19 clarifying memorandum covering both periods is dated 11 January 2012.

20 Before I proceed on that, I announced that the dates of the  
21 Article 32 Investigation were 12 December 11 through 11 January 2012.  
22 The actual Article 32 Investigation began on 16 December. Is that  
23 correct?

1 TC[MAJ FEIN]: Yes, Your Honor.

2 MJ: Okay.

3 TC[MAJ FEIN]: The investigation started then.

4 MJ: And concluded on the 23rd of December. Is that correct?

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 TC[MAJ FEIN]: Ma'am, I think it was the 22nd of December.

7 MJ: The 22nd of December? Now, the Investigating Officer's

8 final report was submitted on what day?

9 TC[MAJ FEIN]: May I have a moment, Your Honor?

10 MJ: Yes.

11 [Pause.]

12 MJ: Anyway, do both sides agree that the Article 32 period

13 would begin the 16th of December through the date that the IO

14 submitted his final report?

15 CDC[MR. COOMBS]: Yes, Your Honor.

16 TC[MAJ FEIN]: Yes, Your Honor.

17 MJ: All right. The Court will amend its ruling accordingly.

18 And the dates don't affect the determination of the Court

19 with respect to that time period, those dates.

20 All right. Period three, 4 February 2012 to 7 February

21 2012; 4 days.

22 Findings of Fact: This case was referred on 3 February

23 2012. The Court received the referral on 3 February 2012. Also, on

1 3 February 2012, the government sent the Court its electronic docket  
2 notification (EDN) requesting immediate arraignment, but no sooner  
3 than 10 days after the Court sets arraignment date to allow for  
4 implementation of the OPORD to coordinate the accused's travel,  
5 provide adequate security for the accused, the parties and the Court,  
6 and to finalize preparation of courthouse infrastructure to  
7 accommodate the public.

8 On 4 February 2012, the Court sent an e-mail to the parties  
9 advising them to confer and select 6, 9 or 10 February 2012, for a  
10 telephonic R.C.M. 802 conference to set an arraignment date. The  
11 Court further advised the parties that the Court was available for  
12 arraignment 14 through 17 or 22 through 25 February 2012.

13 On 4 February 2012, the Court received an e-mail from Mr.  
14 Coombs requesting arraignment either 24 or 25 February 2012. On 6  
15 February 2012, the Court received a defense EDN advising that the  
16 defense was not available for arraignment 13 through 17 February  
17 2012, and requesting arraignment 23 or 24 February 2012.

18 Also, on 6 February 2012, the Court received an e-mail from  
19 the government advising that the parties had agreed to arraignment on  
20 23 February 2012 at 1300. The Court docketed the 23 February 2012,  
21 arraignment on 6 February 2012.

22 Conclusions of Law: The period between 4 through 7  
23 February 2012 is excludable delay under R.C.M. 707(c) by Rule 1.1 of

1 the Rules of Practice Before Army Court-Martial, 5 September 2009, in  
2 effect on 23 February 2012. This period also qualifies as excludable  
3 delay with the concurrence of the defense.

4 Four, 4 March 2011 to 15 December 2011, 287 days.

5 A. R.C.M. 706 request board requested delay 4 March  
6 through 22 April 2012, 50 days.

7 Findings of Fact: On 11 August 2010, the defense requested  
8 a delay of the Article 32 Investigation until completion of the  
9 sanity board. On 12 August 2010, the Special Court-Martial Convening  
10 Authority approved the request until the R.C.M. 706 board was  
11 complete.

12 Starting on 25 August 2010, the defense requested a series  
13 of delays of the R.C.M. 704 -- 06 board that were approved by the  
14 Convening Authority. The PCR was conducted, TS-SCI security  
15 clearances were obtained, defense expert consultants were appointed.  
16 The defense does not contest the period of time between 11 August  
17 2010 and 3 March 2011, as excludable delay.

18 The Special Court-Martial Convening Authority ordered the  
19 R.C.M. 706 board to resume on 3 February 2011, with a 4-week suspense  
20 date. On 7 February 2011, civilian defense counsel e-mailed the  
21 board advising them that the suspense was aspirational and requesting  
22 that the board take the time necessary to conduct a thorough and

1 complete examination and that any requests for extension of time  
2 would undoubtedly be granted.

3           The Court agrees that a 4-week suspense for a routine  
4 R.C.M. 706 board is aspirational. The R.C.M. 706 board in this case  
5 had three members, each of which was required to have TS-SCI  
6 clearances, was required to conduct additional neurological tests and  
7 was required to interview the accused in a SCIF and during the  
8 weekend for the accused's privacy and security.

9           Between 9 and 11 February 2011, the R.C.M. 706 board  
10 proposed a schedule of unclassified interview of the accused on 16  
11 February 2011, followed by testing on 17 February 2011, and the  
12 classified interview in the SCIF on 1 March 2011.

13           On 21 February 2011, civilian defense counsel requested  
14 that the government arrange for a SCIF to be available for the  
15 defense to interview the accused before the R.C.M. 706 board  
16 interview. Civilian defense counsel requested 14 days' notice to  
17 purchase reasonably priced airline tickets.

18           On 25 February 2011, civilian defense counsel advised the  
19 government that the earliest the defense would be available to meet  
20 with the accused was the week of 7 March 2011. This was after the 4  
21 March 2011, R.C.M. 706 board's suspense date.

22           On 25 February 2011 until 3 March 2011, the government  
23 coordinated with INSCOM to make a SCIF available to the defense and

1 to the R.C.M. 706 board. The R.C.M. 706 board wanted to interview  
2 the accused on 11 March 2011, a Friday. The government arranged for  
3 interviews of the accused at the SCIF to be on Saturdays where there  
4 would be few, if any, workers in the area.

5 On 5 March 2011, the CDC requested from the government that  
6 his meeting with the accused take place on 11 and 12 March 2011, with  
7 alternative dates 25 through 26 March 2011. The government advised  
8 CDC that the government had to confirm with the security detail and  
9 would know by 7 March 2011, a Monday.

10 On 7 March 2011, the civilian defense counsel requested the  
11 defense interview with the accused take place on 25 through 26 March  
12 2011. Meanwhile, the R.C.M. 706 board coordinated their classified  
13 interview with the accused and proposed that it take place 26 March  
14 2011. Both the defense and the R.C.M. 706 board interview required  
15 an entire day.

16 On 14 March 2011, the government proposed 2 April 2011, as  
17 an alternative date for the R.C.M. 706 board interview. All board  
18 members were available to conduct the interview with the accused on 9  
19 April 2011.

20 The R.C.M. 706 board requested extensions on 14 March 2011,  
21 with a proposed suspense of 29 April 2011, requesting 3 weeks to  
22 finalize their report after the 9 April 2011, interview with the  
23 accused. Special Court-Martial Convening Authority approved

1 extension, but only until 16 April 2011. The board advised the  
2 government that report could be finished by 16 April 2011, but it  
3 would be rushed.

4           The R.C.M. 706 board was 98 percent complete on 15 April  
5 2011; however, the board felt it necessary to meet and thoroughly  
6 review the results rather than rush the report to conclusion. On 15  
7 April 2011, the board again requested an extension until 22 April  
8 2012 [sic]. The Special Court-Martial Convening Authority approved  
9 this extension. The board completed its report on 22 April 2011 --  
10 not 22 April 2012. The board completed its report on 22 April 2011.

11           Conclusions of Law. The Special Court-Martial Convening  
12 Authority did not abuse his discretion in granting the extensions or  
13 in excluding either the 14 March 2011 or the 15 April 2011 requests  
14 by the R.C.M. 706 board for delay or excluding the delay under R.C.M.  
15 707(c). The initial suspense to the board was extremely short. The  
16 board had legitimate reasons to request each extension. Defense  
17 counsel advised the board that the defense was more interested in a  
18 thorough R.C.M. 706 board than a rush to complete the end product.  
19 The R.C.M. 706 interview of the accused was delayed to accommodate  
20 the defense request to interview the accused before. The length of  
21 each delay was reasonable. The period of delay from 4 March 2011 to  
22 22 April 2011, was properly excluded by the Special Court-Martial  
23 Convening Authority.



1 Government requested delays.

2 Findings of fact. Military authorities were not aware that  
3 the accused was allegedly involved in any disclosures of classified  
4 information to WikiLeaks until Adrian Lamo's 25 May 2010 report.  
5 Thus the CID investigation began at that time in a combat zone.

6 When the Iraq trial counsel team preferred the original  
7 charges on 5 July 2010, the investigation was in its infancy. The  
8 accused was charged with four specifications of violating a lawful  
9 general order in violation of Article 92, UCMJ; one specification in  
10 violation of 18 United States Code Section 793(e); three  
11 specifications in violation of 18 United States Code Section  
12 1030(a)1; and five specifications of violating 18 United States Code  
13 Section 1038(a)(2). These eight specifications were also in  
14 violation of Article 134, UCMJ. The government was not aware of the  
15 scope and breadth of the alleged misconduct by the accused when he  
16 was originally charged.

17 The originally charged offenses involve a video of a  
18 military operation filmed near Baghdad, Iraq, on or about 12 July  
19 2007, more than 50 classified DoS cables, a classified Microsoft  
20 PowerPoint Presentation, a classified DOS cable entitled "Reykjavik-  
21 13," and more than 150 classified Department of State Cables.

22 In August of 2010, the government initially contacted the  
23 Department of State regarding classification review of the originally

1 charged cables. In October 2010, the government contacted CENTCOM  
2 regarding classification reviews of the originally charged documents.

3 On 18 October 2010, the government received the OCA review  
4 of the Apache video.

5 On 26 August 2010, the defense requested the government to  
6 provide original classification reviews to include: one, the  
7 classification level of the information alleged to have been  
8 disclosed by the accused when it was subject to compromise; two, a  
9 determination of whether another command requires review of the  
10 information; and three, the general description of the impact of  
11 disclosure of effected operations. In subsequent discovery requests  
12 the defense requested the CCIU, forensic reports and other evidence  
13 the government would use at trial.

14 During the fall of 2010, while the PSR was ongoing and the  
15 R.C.M. 706 board was on hold, investigative agencies were continuing  
16 to investigate the case. WikiLeaks made rolling disclosures of  
17 classified information allegedly provided by the accused and the  
18 government was coordinating with DoJ and consulting Code 50 OTJAG, US  
19 Navy Primer on prosecuting, defending and adjudicating cases  
20 involving classified information.

21 On 3 November 2010, CID conducted a second search of the  
22 accused's aunt's house and discovered additional digital media, one  
23 hard disc drive, three SD memory cards, one smart media card, 14 CDR

1 discs, two CDR-W discs, and one memory USB -- excuse me, one USB  
2 memory card. As the investigation matured and the government became  
3 more fully informed of the potential scope of the misconduct alleged  
4 to have been committed by the accused, the government coordinated  
5 with the Department of State and other equity holders of the  
6 information in the current Charge Sheet to receive approval to charge  
7 each equity holders' classified information. After receiving all the  
8 required approvals, the government preferred the charges currently  
9 before the Court on 1 March 2011.

10 The government sent out the following prudential search,  
11 preservation and review requests:

12 30 September 2010, preservation request to the 2 of the  
13 2nd, 10th Mountain Division; 25 May 2011, search request to OGA 1,  
14 DoD, DoS, OGA 2, ODNI and ONCIX.

15 6 June 2011, search requests to DoD.

16 14 June 2011, search request to DIA, DoS, OGA 2, and ODNI.

17 27 through 28 June 2011, search request to FBI, DoJ and  
18 DISA.

19 On or about 21 July 2011, DoD tasking responding to search  
20 request to DoD.

21 16 August 2011, search request to DoJ.

22 6 October 2011, defense request to locate and preserve  
23 evidence.

1           6 October 2011, request to review damage assessments to  
2 DoS, FBI, ODNI, OGA 1 and OGA 2.

3           The agencies receiving the prudential search requests  
4 (PSRs), were creating records documenting damage from the WikiLeaks  
5 releases and mitigation efforts taken by the agency. The government  
6 sent the PSRs to preserve potential discoverable information created  
7 after the accused's alleged misconduct rather than preserve  
8 information or evidence created at or before the alleged misconduct  
9 by the accused.

10           On 30 November 2010, the prosecution submitted a written  
11 request to DoD for a classification review of evidence it intended to  
12 review.

13           On 18 March 2011, the government submitted written requests  
14 to the following organizations for classification reviews of the  
15 records charged in the 1 March 2011 preferred Charge Sheet: CENTCOM,  
16 OGA 1, DoS, SOUTHCOM, DSSA, CYBERCOM, ODNI, INSCOM and OGA 2. The 18  
17 March 2011, requests had a suspense of 31 March 2011.

18           The government sent follow-up written requests to each of  
19 these entities as set forth in the attached chronology. Each of the  
20 follow-up requests had 2-week suspense dates, emphasized urgency and  
21 explained the rights of the accused to a speedy trial. Neither the  
22 prosecution team nor the Special Court-Martial Convening Authority

1 had tasking authority over the original classification authority  
2 entities.

3           The government requested completion of the classification  
4 review multiple times. The government sent memoranda to the OCAs on  
5 18 March 2011, 28 June -- July 2011, 4 August 2011, and 7 September  
6 2011, and 6 October 2011. Each time asking -- seeking completion of  
7 the classification reviews with a short suspense. In these memoranda  
8 the government reminded the OCAs of their obligations under Article  
9 10 UCMJ and the Sixth Amendment, noting any delay by your department  
10 to comply with this firm deadline may severely jeopardize the  
11 prosecution.

12           Classification review requires a manual line-by-line review  
13 of a document and its classification markings to determine if a  
14 document has been properly classified, is properly marked consistent  
15 with a source of classification or an OCA decision.

16           Further, classification reviews require a determination of  
17 each particular word or phrase in an effort to redact such words and  
18 phrases to create an unclassified document. Extensive interagency  
19 coordination is required to complete classification reviews. One  
20 document can have multiple sources of classification, potentially  
21 from sources not under the authority of the original OCA. Each OCA  
22 with an equity in the classified information must review it. There

1 is no correlation between the complexity of the review and the number  
2 of pages of the final OCA reviewed product.

3           The majority of the evidence that the government intended  
4 to present at trial was classified or unclassified, but sensitive.  
5 The government's goal was to obtain the OCA reviews and obtain  
6 authority to disclose the charged documents, its classification  
7 reviews, and CCI forensic reports to the defense to ensure the  
8 defense had all of the charged information and all of the evidence  
9 the government intended to use in its case in chief at trial before  
10 the Article 32 Investigation. This required contacting each of the  
11 potentially multiple equity holders to the classified information to  
12 receive approvals to disclose the information.

13           The government believed the OCA reviews were necessary to  
14 prove that the information at issue was classified, to ensure the  
15 information was properly handled at trial and to prove there was an  
16 overriding interest in protecting against disclosure of classified  
17 information, to justify closing portions of the Article 32  
18 Investigation.

19           The government believed the disclosure of the forensic  
20 reports to the defense prior to the Article 32 was necessary to show  
21 the government theory of the case and if the Article 32 occurred  
22 without evidence linking the accused to the charged misconduct, the

1 government would likely fail in its burden of proof and open itself  
2 to challenge that the Article 32 was defective.

3 On 16 December 2010, the Secretary of the Army ordered an  
4 AR 15-6 Investigation.

5 On 14 February 2011, the Secretary of the Army 15-6 was  
6 complete.

7 On or about 15 March 2011, the government submitted a  
8 request to review it and received approval to review it on 21 March  
9 2011, and reviewed it from March to 30 May 2011.

10 On 17 June 2011, the government received authority to  
11 disclose the SEC Army 15-6 Investigation to the defense upon  
12 acknowledge of receipt of the Special Court-Martial Convening  
13 Authority protective order.

14 On or about 12 July 2012, the government produced the  
15 investigation to the defense.

16 The regulation 380-5 Investigation was complete on 16 July  
17 2010. The government learned of it in September 2010, and received a  
18 digital copy. The government reviewed the investigation and  
19 disclosed it to the defense on 9 February 2011.

20 USACID, Computer Crimes Investigative Unit (CCIU) generated  
21 an unclassified report and a classified report, both still ongoing.  
22 CID completed 22 forensic reports; three unclassified reports of  
23 NIPRNET systems, 15 September 2010, 20 September 2010 and 27 July

1 2011; one unclassified report of a SIPRNET system, 22 September 2011;  
2 one unclassified of digital media, 22 September 2011; and 17  
3 classified reports, 22 September 2011 and 20 October 2011.

4 Before releasing the final reports CCIU produced 10 interim  
5 reports of approximate dates: 7 and 13 July 2010, 6 and 23 August  
6 2010, 21 January 2011, 2 February 2011, 7 and 8 June 2011, 18 July  
7 2011, and 22 September 2011.

8 CID also collected multiple sets of audit data or logs for  
9 the computer networks from which the data from the devices came.  
10 Some of the logs contained only classified data. Others contained  
11 both classified and unclassified data.

12 In addition to the classified information, the unclassified  
13 CID reports contained unclassified but protected information and  
14 classified information. This required the Department of Justice to  
15 review the report for Grand Jury information and information obtained  
16 by sealed warrants.

17 On or about April 2011, the government requested the Army  
18 G2 to review the unclassified CID file to identify any potentially  
19 classified material. The G2 reviewed the reports and identified two  
20 major equity holders with classified information. The government  
21 requested both equity holders to review the relevant portions of the  
22 classified information. The government requested both equity holders  
23 -- excuse me. Both discovered classified information. The



1 government then requested authority to disclose the information to  
2 the defense and have the documents properly marked as classified  
3 material.

4           The Iraq trial counsel team received approvals to disclose  
5 200 pages. The information was disclosed to the defense on 22  
6 October 2010. The government received further approvals on 16 June  
7 2011, contingent on the defense executing a Special Court-Martial  
8 Convening Authority protective order. The unclassified CID reports  
9 were disclosed to the defense between 25 July 2011 and 3 August 2012.

10           On or about 17 September 2011, all organizations approved  
11 disclosure of classified information from the original unclassified  
12 file. The government received the information on 27 October 2011,  
13 and disclosed it to the defense on 17 November 2011.

14           CID continues to receive information and the government  
15 continues to process it for release to the defense.

16           On 12 March 2011, the government requested that CID conduct  
17 an administrative review of the previously identified classified  
18 information in the case file to identify what equity holders may have  
19 classified information in the case file.

20           The case file consisted of classified and unclassified  
21 files and of forensic reports.

22           The government intended to receive approvals from the OCAs  
23 to disclose CID documents containing classified information and

1 derivative reports to include the forensic reports for the defense.  
2 Authority to approve disclosure of the forensic reports was directly  
3 tied to approval to disclose the underlying evidence.

4           The government received final approval from all equity  
5 holders on 28 October 2011. In total the CCIU analyzed approximately  
6 8 terabytes of digital media containing classified information.

7           Prior to producing the forensic images of the memory drives  
8 of the devices, the government was required to coordinate with every  
9 government agency OCA that had data on the drives. The government  
10 initially searched the drives with security experts to identify  
11 agencies involved and the relevant OCAs.

12           On the following dates the government submitted written  
13 requests to OCAs authorized to approve disclosures of the charged  
14 documents and other classified information to the defense:

15           14 March 2011, DoD and DA, approved 30 March 2011, with  
16 final approval on 28 October 2011 for all CCIU classified forensic  
17 reports and data files.

18           DoS approved 29 March 2011, ODNI partial approval 9 August  
19 2011, full approval of intel logs 4 October 2011.

20           OGA 1 approved 29 March 2011 and OGA 2 approved 28 April  
21 2011.

22           21 March 2011, DSSA, approved 29 March 2011; and DIA  
23 approved 7 April 2011.

1           23 June updated request to OGA 1, 23 June 2011 and 4 August  
2 2012.

3           Updated requests to FBI, DoD, final approval on 28 October  
4 2011.

5           DIA approved through the summer of 2011.

6           11 August 2011, updated requests to OGA 1.

7           On 3 October 2011, the government received the final  
8 forensic reports from CCIU. On 4 October 2011, CCIU approved release  
9 of the reports after review to ensure none of the information was  
10 classified in accordance with CIDs OCA authority.

11           Between 3 and 26 October, the government processed the  
12 330,000 page report and prepared it for production.

13           On 26 October 2011, the government requested to the Army G2  
14 for approval to disclose the Army CID forensic reports that involve  
15 DoD equities and equities of other agencies that have approved  
16 release.

17           On 28 October 2011, the government received from all  
18 relevant OCA approvals to disclose all images of digital data.

19           On 4 November 2011, the government disclosed that  
20 information to the defense.

21           Apparently, as of 15 February 2011, the government believed  
22 it would have all the OCA reviews and necessary approvals to disclose  
23 the CCIU forensic reports to the defense before 15 March 2011, when

1 the government e-mailed the Article 32 IO advising him that the  
2 R.C.M. 706 board had a 3 March 2011 suspense date and the Article 32  
3 would be ready to begin on 15 March and last 3 days.

4 Beginning on 25 April 2011, the government began requesting  
5 approximately monthly delays between 22 April 2011 and the restart of  
6 the Article 32 Investigation: 25 April -- May -- I'm sorry, 25 April  
7 2011, 22 May 2011, 27 June 2011, 25 July 2011, 25 August 2011, 26  
8 September 2011, 25 October 2011, 16 November 2011.

9 The government developed a process of providing the Special  
10 Court-Martial Convening Authority with a monthly request for a delay  
11 specifying the reasons for the delay, the progress made in the case  
12 that month, and an update would be provided by the government to the  
13 Special Court-Martial Convening Authority in 30 days. The Convening  
14 Authority would request the views of the defense, decide whether to  
15 approve the requested delay and subsequently provide a monthly  
16 accounting memorandum documenting the period and reasons for the  
17 excludable delay.

18 Starting with the memorandum on 26 April 2011, the defense  
19 objected to each delay. The 26 April 2011, memorandum requested to  
20 avoid delay of the Article 32 that the Special Court-Martial  
21 Convening Authority: One, provide either a substitute for or a  
22 summary of the information of relevant classified documents; two  
23 allow the defense to inspect any and all unclassified documents and

1 reports within the government's control which are material to the  
2 preparation of the defense or requested by a defense discovery  
3 request; three, ensure the defense has equal access to CID and other  
4 law enforcement witnesses by requiring trial counsel to make the  
5 witnesses available. The defense memorandum advised the Special  
6 Court-Martial Convening Authority that because of the limited  
7 discovery provided, it was likely the Article 32 would be delayed  
8 unless the above information is provided in a timely manner and  
9 requested that any delay be credited toward the government.

10 On 24 May 2011, 29 June 2011, 27 August 2011, 27 September  
11 2011 and 25 October 2011, the defense objected via e-mail to the  
12 second, third, fifth, sixth and seventh government request for  
13 excludable delay by adhering to its position in the 26 April 2011  
14 memorandum.

15 On 25 July 2011, the defense submitted a memorandum in  
16 objection to the government's fourth request for excludable delay  
17 reiterating its objection to the 26 April -- in the 26 April 2011,  
18 memorandum and renewing its 9 January 2011 speedy trial demand.

19 Below is a summary of the government request and monthly  
20 accounting memorandum:

21 25 April 2011, first request for delay, 22 April to 25 May  
22 2011. Under Executive Orders 12958 and 13526 and Army Regulations  
23 380-5 and 380-67, the United States cannot release classified

1 information originating in a department or agency to parties outside  
2 the Executive Branch without the consent of the OCA or his delegate  
3 -- or their delegate. Since 17 June 2010, the United States had been  
4 diligently working with all the departments and agencies that  
5 originally classified the information and evidence sought to be  
6 disclosed to the defense and the accused.

7           Enclosed are redacted copies of the OCA disclosure requests  
8 and OCA classification review requests without their enclosures  
9 respectively; however, because of the special circumstances of this  
10 case, including the voluminous amounts of classified digital media  
11 containing multiple equities and subsequent discovery of more  
12 information helpful to both the United States and the accused, more  
13 time is needed for Executive Branch and agencies to obtain necessary  
14 consent from their OCA and authorizing officials.

15           The delay was approved by the Special Court-Martial  
16 Convening Authority on 29 April 2011, requiring trial counsel update  
17 no later than 23 May 2011.

18           The 12 May 2011, accounting memorandum excluded delay from  
19 22 April to 12 May 2011, based upon:

- 20           A. OCA reviews of classified information;  
21           B. OCA consent to disclose classified information;  
22           C. Defense requests for results of OCA reviews, 26 August  
23 2010;

1 D. Defense requests for appropriate security clearances  
2 for the defense team and access for PFC Manning, 3 September 2010;

3 E. 25 April 2011, government request for delay.

4 22 May 2011, second request for delay. 25 May to 27 June  
5 2011. The government is continuing to work with the relevant OCAs to  
6 obtain consent to disclose classified evidence and information to the  
7 defense along with receiving completed classification reviews. In  
8 anticipation of the OCA consent, CID began making copies of  
9 classified digital media and evidence for disclosure to the defense.  
10 Additionally, the prosecution learned that in several exhibits and  
11 documents in the unclassified CID file require authorization to  
12 disclose apart from any classified information. The U.S. Attorney's  
13 Office for the Eastern District of Virginia is working to obtain that  
14 authorization on behalf of the prosecution for multiple federal  
15 districts within the United States.

16 The delay was approved by the Special Court-Martial  
17 Convening Authority on 26 May 2011, requiring trial counsel update no  
18 later than 25 June 2011.

19 17 June 2011, accounting memorandum excluded delay between  
20 22 April -- excuse me, excluded delay from May to June, based upon  
21 OCA reviews of classified information. OCA consent to disclose  
22 classified information, defense request for results of OCA reviews,  
23 26 August 2010, defense request for appropriate security clearances

1 for the defense team and access for PFC Manning, 3 September 2010, in  
2 the 22 May 2011 request for delay.

3 5 July 2011, third request for a delay: 27 June to 27 July  
4 2011:

5 A. The prosecution is continuing to work with the relevant  
6 OCAs to obtain consent to disclose classified evidence and  
7 information to the defense along with receiving completed  
8 classification reviews. This includes the enclosed additional  
9 requests forwarded by the prosecution on 23 June 2011, after forensic  
10 examiners discovered another document on digital evidence requiring  
11 OCA consent to disclose to the defense.

12 B. The prosecution submitted the unclassified CID case  
13 file to the National Security Agency (NSA) and other government  
14 intelligence organization, OGA, to have their experts review the file  
15 for classified equity. The NSA identified approximately 20 sensitive  
16 documents requiring further review by their subject matter experts.  
17 The OGA is continuing their review of the documents.

18 C. The U.S. Attorney's Office for the Eastern District of  
19 Virginia is continuing to work on obtaining authorizations from the  
20 relevant district court judges on behalf of the prosecution to  
21 disclose certain exhibits and documents to the defense. Most of the  
22 relevant disclosure orders have been signed, but a few remain  
23 outstanding. Since the previous request the prosecution has received



1 approval to produce the Secretary of the Army AR 15-6 and related  
2 documents after the defense acknowledges your protective order dated  
3 22 June 2011, the prosecution will immediately produce those  
4 documents and continue to produce evidence and information for the  
5 defense.

6 This delay was approved by the Special Court-Martial  
7 Convening Authority on 5 July 2011, requiring trial counsel update no  
8 later than 25 July 2011.

9 The 13 July 2011, accounting memorandum, excluded delay.

10 From 17 June 2011 to 13 July 2011, based on OCA reviews of  
11 classified information; OCA consent to disclose information; C,  
12 defense request for results of OCA reviews, 26 August 2010; D,  
13 defense request for appropriate security clearances for the defense  
14 team and access for PFC Manning, 3 September 2010; and E, 5 July  
15 2011, government request for delay.

16 25 July 2011, fourth request for delay: 27 July to 27  
17 August 2011:

18 A. The prosecution is continuing to work with relevant  
19 OCAs to obtain consent to disclose classified evidence along with  
20 receiving completed classification reviews. Classified CID forensic  
21 reports are prepared for disclosure pending final approval by the  
22 relevant OCAs and final review of references to classified  
23 information within the forensic reports.

1           B. The prosecution submitted the unclassified CID case  
2 file to the NSA and OGA to have their experts review the file for  
3 classified equities. The NSA identified approximately 20 sensitive  
4 documents requiring further review by their subject matter experts.  
5 The OGA identified six sensitive documents requiring further review.

6           C. The United States Attorney's Office for the Eastern  
7 District of Virginia is continuing to work on obtaining  
8 authorizations from the relevant district court judges on behalf of  
9 the prosecution to disclose certain exhibits and documents to the  
10 defense. Most of the relevant disclosure orders have been signed,  
11 but a few remain outstanding.

12           D. Since the previous request the prosecution has produced  
13 the Secretary of the Army AR 15-6 Investigation and related documents  
14 as well as the complete record of the Master Sergeant Adkins  
15 Reduction Board, approximately 10,000 pages of documents in total.  
16 The prosecution intends to produce portions of the unclassified CID  
17 case file that have been approved for release by relevant stake  
18 holder agencies no later than the date of this memorandum. As the  
19 prosecution receives other approvals, it will continue to disclose  
20 evidence and information to the defense.

21           This delay was approved by the Special Court-Martial  
22 Convening Authority on 26 July 2011, requiring trial counsel update  
23 no later than 25 August 2011.

1           The 10 August 2011, accounting memorandum excluded delay  
2 from 13 July 2011 to 10 August 2011, based on:

3           A. OCA reviews of classified information;

4           B. OCA consent to disclose classified information;

5           C. Defense request for results of OCA reviews, 26 August  
6 2010;

7           D. Defense request for appropriate security clearances for  
8 the defense team and access for PFC Manning, 3 September 2010;

9           E. 25 July 2011, government request for delay.

10           25 August 2011, fifth request for delay, 27 August to 27  
11 September 2011.

12           A. The prosecution is continuing to work with relevant  
13 OCAs to obtain consent to disclose classified evidence along with  
14 receiving completed classification reviews.

15           B. CID is conducting a secondary review of the derivative  
16 classification of the forensic reports. Recently the government's  
17 security expert reviewed the forensic reports and advised that  
18 portions of the reports should be reviewed based on the security  
19 classification guides governing the information. Prosecution intends  
20 to produce the full reports once the final documentation of the  
21 derivative classification is made by CID command and the Army G2  
22 gives consent for release. Three of these reports are unclassified  
23 in their entirety and were given to the defense on 25 July 2011. The

1 prosecution submitted the unclassified CID case file to the NSA and  
2 OGA to have their experts review the file for classified equities.  
3 The NSA identified approximately 20 sensitive documents requiring  
4 further review by their subject matter experts. The OGA identified  
5 six sensitive documents requiring further review. The OGA completed  
6 its additional review, but the NSA review is still on going.

7           D. The U.S. Attorney's Office for the Eastern District of  
8 Virginia has obtained all authorizations from the relevant district  
9 court judges on behalf of the prosecution and the prosecution is  
10 currently obtaining signed protective orders from the defense as  
11 required by district court judges to allow disclosure of all relevant  
12 exhibits and documents to the defense.

13           E. The prosecution is continuing to work with the Federal  
14 Bureau of Investigation (FBI), the Diplomatic Security Service (DSS)  
15 to receive authorization to disclose relevant portions of any case  
16 files. This includes obtaining copies of the FBI and DSS case files,  
17 if any, to conduct a search of the files for discoverable  
18 information.

19           F. Since the previous request the prosecution has produced  
20 21,442 pages of documents, Bates numbers omitted. The evidence and  
21 information disclosed include the vast majority of the unclassified  
22 CID file, Major Clausen Administrative Reprimand file, recordings of  
23 all visits with PFC Manning at Marine Corps Brig Quantico, and

1 various other documents. As the prosecution receives other  
2 approvals, it will continue to disclose evidence and information to  
3 the defense.

4 Delay approved by the Special Court-Martial Convening  
5 Authority on 29 August 2011, requiring trial counsel update no later  
6 than 23 September 2011.

7 26 September 2011, sixth request for delay, 27 September  
8 through 27 October 2011.

9 A. The prosecution is continuing to work with the relevant  
10 OCAs to obtain consent to disclose classified evidence to the defense  
11 and to receive completed classification reviews. Since the last  
12 request the prosecution received a classification review from the OCA  
13 at U.S.C.YBER Command. Additionally, the prosecution is working  
14 closely with Department of State and SOUTHCOM and expects to receive  
15 classification reviews from more than 80 documents within the next 2  
16 weeks.

17 CID started the necessary secondary review of the  
18 derivative classification of the forensic reports and the forensic  
19 reports are in the final stages of review before release. After CID  
20 completes its review and the Army G2 gives consent to release, the  
21 prosecution intends to produce the full reports with their enclosures  
22 and attachments to the defense.

1           C. The prosecution submitted the unclassified CID file to  
2 the NSA and OGA to have their experts review the file for classified  
3 equities. Both the NSA and OGA have completed their additional  
4 review. The prosecution is working with the NSA to provide portion  
5 marked versions -- a portion marked version of the documents that  
6 they deem classified.

7           The U.S. Attorney's Office for the Eastern District of  
8 Virginia has obtained all authorizations from the relevant district  
9 court judges on behalf of the prosecution. The prosecution is  
10 continuing to obtain signed protective orders from the defense as  
11 required by district court judges to allow disclosure of all relevant  
12 exhibits and documents to the defense.

13           The prosecution continues to work with the FBI and DSS to  
14 receive authorization to disclose relevant portions of the case  
15 files. The prosecution received copies of the FBI and DSS case files  
16 and started to review those files for discoverable information. Once  
17 the prosecution identifies discoverable information, it will work to  
18 obtain the proper authorization to produce the relevant portion to  
19 the defense.

20           F. Since the previous request, the prosecution has  
21 produced 2,492 documents, dates, numbers omitted. The evidence and  
22 information disclosed included documentation from the confinement  
23 facilities as well as the majority of two classified military

1 intelligence investigative case files. As the prosecution receives  
2 other approvals, it will continue to disclose evidence and  
3 information to the defense.

4 This delay was approved by the Special Court-Martial  
5 Convening Authority on 28 September 2011, requiring trial counsel  
6 update no later than 25 October 2011.

7 14 October 2011, accounting memorandum excluded delay from  
8 15 September 2011 to 14 October, based upon:

- 9 A. OCA reviews of classified information;
- 10 B. OCA consent to disclose classified information;
- 11 C. Defense request for results of OCA reviews, 26 August  
12 2010;
- 13 D. Defense request for appropriate security clearances  
14 from the defense team and access for PFC Manning, 3 September 2010;
- 15 E. 26 September 2011, government request for delay.  
16 25 October 2011, seventh request for delay: 27 October  
17 2011 to 28 November 2011.

18 The prosecution is continuing to work with relevant OCAs to  
19 obtain consent to disclose classified evidence to the defense and to  
20 receive completed classification reviews.

21 Within the last several days, the prosecution received a  
22 classification review of approximately 100 documents and a video from  
23 the OCA of CENTCOM. Additionally, the prosecution is continuing to

1 work closely with DoS, OGA and SOUTHCOM and expects to receive  
2 classification reviews for more than 80 documents before 1 November  
3 2011.

4           B. CID completed the necessary secondary review of  
5 derivative classification of the forensic reports and the prosecution  
6 is currently processing and packaging the forensic reports,  
7 enclosures and attachments for delivery to the Army G2 no later than  
8 27 October 2011. These reports consist of 40,000 documents totaling  
9 more than 300,000 pages. The prosecution will release the final  
10 forensic reports to the defense once the review by the Army G2 is  
11 complete and consent to disclose it is received.

12           C. The prosecution submitted the unclassified CID case  
13 file to the NSA and OGA to have their experts review the file for  
14 classified equities. Both the NSA and OGA have completed their  
15 additional review. Absent an unforeseen administrative issue, the  
16 prosecution will produce portion marked versions of the documents  
17 deemed classified by the NSA and OGA no later than 27 October 2011.

18           D. Based upon discussions with multiple OGAs, the -- OCAs,  
19 excuse me, the prosecution's security expert is developing an  
20 evidence classification guide (ECG) to aid law enforcement,  
21 prosecution, defense and other government officials in understanding  
22 what specific investigative information is classified. Although this  
23 guide will not be a security classification guide published by an



1 OCA, this guide is based upon derivative classifications that can be  
2 used by all parties and potential witnesses to understand what  
3 information is classified or not. In the short term, the guide will  
4 be used by CID agents and government officials when discussing the  
5 case with the defense.

6           The prosecution continues to work with the FBI and DSS to  
7 receive authorization to disclose relevant portions of any case  
8 files. The prosecution received copies of the FBI and DSS case files  
9 and started to review those files for discoverable information. Once  
10 the prosecution identifies discoverable information, it will work to  
11 obtain the proper authorization to produce the relevant portions to  
12 the defense.

13           F. Since the previous request, the prosecution has  
14 produced 771 pages of documents, Bates numbers omitted. The evidence  
15 and information disclosed consisted of additional documents from the  
16 CID case file. As the prosecution receives other approvals, it will  
17 continue to disclose evidence and information to the defense.

18           G. The prosecution scheduled a meeting with the defense  
19 for 8 through 9 November 2011. The purpose of the meeting is for the  
20 prosecution to present its case, including a discussion of evidence  
21 supporting the charges against the accused and present potential plea  
22 terms. The goal of the meeting is to help the defense focus their

1 review of the voluminous forensic evidence and minimize future  
2 delays.

3 H. The prosecution continues to work with the defense to  
4 front load any administrative requirements for defense members and  
5 the forensic computer experts to review classified information.  
6 Additionally, the prosecution ordered several items requested by  
7 defense counsel, including a color printer, GSA approved shredder and  
8 large courier bags for the transportation of classified information.

9 This delay was approved by the Special Court-Martial  
10 Convening Authority on 27 October 2011, requiring trial counsel  
11 update no later than 23 November 2011.

12 16 November 2011, accounting memorandum excluded delay from  
13 15 September 2011 to 14 October 2011 based upon:

- 14 A. OCA reviews of classified information;  
15 B. OCA consent to disclose classified information;  
16 C. Defense request for results of OCA reviews, 26 August  
17 2010;  
18 D. 27 October 2010, government request for delay.

19 16 November 2011, request to restart the Article 32 and  
20 excludable delay from 28 November to 16 December 2011. The  
21 prosecution is prepared to proceed and by 1 December 2011, should  
22 have all approvals and classification reviews necessary to proceed.

23 Restart Request:

1           A. OCA reviews of classified information. The prosecution  
2 received completed classification reviews for all charged documents  
3 except the final charged document relevant to Specification 15 of  
4 Charge II. On 14 November 2011, the prosecution received written  
5 confirmation from an OCA delegate that the classification review for  
6 the final charged document will be complete no later than 1 December  
7 2011, if it is determined that such a declaration is necessary.  
8 Based upon this commitment, the prosecution requests the Article 32  
9 Investigation restart at this time to avoid further delay.

10           B. OCA consent to disclose classified information in  
11 relevant part. The prosecution recently produced 380,000 pages of  
12 discovery to include:

13           One, all charged documents;

14           Two, all final forensic reports;

15           Three, the intelligence investigative case files;

16           Four, classification reviews; and

17           Five, two classified military intelligence investigative  
18 case files.

19           C. Defense request for appropriate security clearances for  
20 defense team and access for the accused. All members of the defense  
21 team received their security clearances on or before 13 October 2011.  
22 On 4 November 2011, the prosecution received the final approval

1 necessary for the defense team and the accused to access all of the  
2 charged documents.

3 Excludable delay:

4 One, Specification 15 document;

5 Two, OPLAN Bravo directs early planning for and ensures  
6 coordinated and synchronized reports of all aspects of the Article 32  
7 Investigation proceeding. The order, OPLAN Bravo requires the  
8 command to coordinate travel, security, public affairs,  
9 infrastructure support including Department of the Army assets for  
10 movement and interagency support for both substance and  
11 administration of the above referenced case.

12 The mission's key tasks include safety and securely  
13 transporting and maintaining custody of the accused, providing  
14 physical security and support at all stages of the proceeding and  
15 conducting public affairs and media support.

16 The command, including its subordinate units and staff  
17 section, requires 30 days to initiate OPLAN Bravo to execute the  
18 specified tasks outlined in Enclosure 4, including allowing adequate  
19 time for contracts to be executed. OPLAN Bravo and its associated  
20 tasks requirements do not begin until you restart the Article 32  
21 Investigation.

1           This delay was approved by the Special Court-Martial  
2 Convening Authority on 16 November 2011, excluding delay from 22  
3 April to 16 December 2011.

4           The 3 January 2012, accounting memorandum. Excluded delay  
5 from 16 November 2011 to 15 December 2011, based upon:

6           OCA reviews of classified information;

7           OCA consent to disclose classified information;

8           Defense request for results of OCA reviews, 26 August 2010;

9           D. 27 August 2011, government request for delay.

10          Conclusions of Law.

11          The decision by the government to obtain all relevant OCA  
12 reviews and CCIU reports and to have both approved for release to the  
13 defense was reasonable under the unique circumstances of this case.  
14 Without the OCA reviews and CCIU reports, the government would likely  
15 not be able to prove its case and would be vulnerable to a challenge  
16 of a defective Article 32 Investigation.

17          The request by the defense for the Special Court-Martial  
18 Convening Authority to provide substitutions or summaries for the OCA  
19 reviews and the CCIU forensic reports is not practicable. The  
20 Special Court-Martial Convening Authority could not provide summaries  
21 or substitutes without coordination and approval of each of the  
22 equity holders involved. The information would have to be properly

1 classified before summaries or substitutions could be negotiated  
2 taking even more time.

3           The government worked diligently to obtain approvals to  
4 disclose evidence it intended to present at the Article 32  
5 Investigation, to obtain protective orders governing the use of  
6 classified and law enforcement sensitive discovery and to prepare  
7 discovery with appropriate classification markings prior to  
8 production.

9           The systematic approach developed and maintained by the  
10 prosecution team and the Special Court-Martial Convening Authority to  
11 develop discovery and data tracking systems and monthly updates to  
12 track the progress of the case is one that should be encouraged,  
13 particularly in a complex case such as this involving a large number  
14 of federal agencies to coordinate with and voluminous information.

15           Each of the seven government requested delays was for  
16 specific reasons that had nexus to the delays granted. Each delay  
17 was for a maximum of 30 days; wherein the Special Court-Martial  
18 Convening Authority received an update as to the status of the case  
19 and the outstanding evidence and approvals necessary for the Article  
20 32 to commence.

21           The government sent follow-up requests to expedite the OCA  
22 reviews, citing the importance of the accused's right to a speedy  
23 trial. During each 30-day period there was progress in the case.

1 Both the complexity of the case and the highly classified nature of  
2 the evidence provided a good cause for the reasonable period of  
3 delay.

4           The final 30-day delay to restart the Article 32 for the  
5 implementation of the preplanned OPLAN Bravo is a reasonable delay to  
6 provide for the extensive coordination and logistics necessary for a  
7 high profile case such as this one, involving voluminous classified  
8 information and requiring heightened security for all the trial  
9 participants.

10           The Special Court-Martial Convening Authority did not abuse  
11 his discretion in granting each of the government requested  
12 excludable delays from 22 April 2011 to 16 December 2011.

13           Ruling.

14           With the 6 days added to the speeding trial clock and  
15 discounting properly excluded delay, the accused was brought to trial  
16 in 90 days, well within the 120 days required by R.C.M. 707. The  
17 defense motion to dismiss the charges for violation of R.C.M. 707 is  
18 denied.

19           The Court's going to take a recess before announcing the  
20 6th Amendment and Article 10 portion of its speedy trial ruling. I  
21 noticed it's almost 12 o'clock. Would the parties prefer to take a  
22 lunch break and then come back and announce that portion of the

1 ruling, or do you want to take a brief recess, come back and then

2 I'll announce that portion of the ruling?

3 CDC[MR. COOMBS]: We can take a lunch break.

4 TC[MAJ FEIN]: That's fine, Your Honor.

5 MJ: How long would you like?

6 TC[MAJ FEIN]: Your Honor, may I have a moment?

7 MJ: Yes.

8 [Pause.]

9 CDC[MR. COOMBS]: 1330, Your Honor, if that's fine with the  
10 Court.

11 TC[MAJ FEIN]: Your Honor, that should be fine. I've asked if  
12 chow is being provided to government -- I'm sorry. Lunch is being  
13 not provided, but is being provided for pay for government employees.  
14 I'm trying to find out right now what time they're supposed to show  
15 up.

16 MJ: Why don't we do this, I mean there's no need in taking a  
17 lunch break if the lunch people are not here ----

18 TC[MAJ FEIN]: I should know that, Your Honor, in hopefully  
19 about 30 seconds.

20 MJ: All right. Court is in recess in place.

21 [The Article 39(a) session recessed at 1159, 26 February 2013.]

22 [The Article 39(a) session was called to order at 1159, 26 February  
23 2013.]



1 MJ: Court is called to order. Let the record reflect all  
2 parties present when the court last recessed are again present in  
3 court.

4 TC[MAJ FEIN]: Ma'am, 1330 is fine.

5 MJ: All right. Court is in recess until 1330.

6 **[The Article 39(a) session recessed at 1200, 26 February 2013.]**

7 **[The Article 39(a) session was called to order at 1338, 26 February**  
8 **2013.]**

9 MJ: This Article 39(a) session is called to order. Let the  
10 record reflect all parties present when the Court last recessed are  
11 again present in court.

12 Is there anything we need to address before the Court  
13 continues to announce its Article 10 Speedy Trial ruling?

14 TC[MAJ FEIN]: No, Your Honor.

15 CDC[MR. COOMBS]: No, Your Honor.

16 MJ: The Sixth Amendment and Article 10. The law.

17 The Sixth Amendment Speedy Trial protection does not apply  
18 to pre-accusation delays where there's been no restraint, *United*  
19 *States v. Reed*, 41 M.J. 449, Court of Appeals for the Armed Forces,  
20 1995. In this case the accused has been restrained pursuant to the  
21 UCMJ charges since 27 May 2010. This date triggers Sixth Amendment  
22 speedy trial protection, *United States v. Marion*, 404 US 307, 1971.  
23 The date trial begins ends Sixth Amendment analysis. In this case,

1 trial is set to begin on 3 June 2013. In addressing Sixth Amendment  
2 speedy trial claims the Supreme Court has set out four factors:

3 One, the length of the delay; two, the reasons for the  
4 delay; three, the assertion of the speedy trial right; and four, the  
5 prejudice to the accused. *Barker v. Wingo* 407 U.S. 514, 1972.

6 When an accused's right to speedy trial is violated, the  
7 remedy is dismissal with prejudice, R.C.M. 707(d)1.

8 Article 10. Article 10, UCMJ, is more stringent or more  
9 exacting than the Sixth Amendment. It provides greater protections  
10 for persons subject to the Uniform Code of Military Justice than does  
11 the Sixth Amendment speedy trial right: *United States v. Cooper*, 58  
12 M.J. 54, 60 Court of Appeals for the Armed Forces, 2003; citing  
13 *United States v. Kossman*, 38 M.J. 258 at 259 Court of Military  
14 Appeals, 1993, greater protections. See also *United States v.*  
15 *Cossio*, 64 M.J. 254 at 256, Court of Appeals for the Armed Forces,  
16 2007, more stringent. *United States v. Mizgala*, 61 M.J. 122 at 124,  
17 Court of Appeals for the Armed Forces, more exacting, citations  
18 omitted.

19 The government must take immediate steps towards trial.  
20 Immediate steps does not mean constant motion, but reasonable  
21 diligence in bringing charges to trial during the accused's pretrial  
22 confinement. Brief periods of inactivity are not fatal to an  
23 otherwise active diligent prosecution. Although Article 10 is more

1 stringent than the Sixth Amendment, the same four *Barker v. Wingo*  
2 factors used to determine whether there has been Sixth Amendment  
3 speedy trial violation also applies when determining whether there  
4 has been an Article 10 violation.

5           If the length of the delay is not facially unreasonably,  
6 the remaining three *Barker* factors do not require analysis: *United*  
7 *States v. Schubert*, Court of Appeals for the Armed Forces, 2011.

8           The government's requirement to exercise reasonable  
9 diligence in bringing the charges to trial does not terminate at  
10 arraignment, but continues until the date of trial: *United States v.*  
11 *Cooper*, 58 M.J. 54, Court of Appeals for the Armed Forces, 2003.

12           Government compliance with R.C.M. 707 doesn't prevent the  
13 government from violating Article 10: *United States v. Birge*, 52 M.J.  
14 209, Court of Appeals for the Armed Forces, 1999.

15           Waiver. A plea of guilty waives any speedy trial issue as  
16 to that offense except a litigated speedy trial motion under Article  
17 10, UCMJ. *United States v. Mizgala*, 61 M.J. 122 at 124, Court of  
18 Appeals for the Armed Forces, 2005.

19           Sixth Amendment Article 10. Article 10 is more stringent  
20 than the Sixth Amendment. Both are analyzed using the *Barker v.*  
21 *Wingo* factors. The Court will address both the Sixth Amendment and  
22 Article 10 using the more strict Article 10 analysis.

23           Findings of fact, prereferral.

1           The chronology of the appendix and the findings of fact  
2 made with respect to the motion to dismiss for violation of speedy  
3 trial under R.C.M. 707 are applicable to the Sixth Amendment Article  
4 10 analysis. The existence of voluminous amounts of classified  
5 materials impacted not only the length of the investigation and  
6 discovery process, but the length of the R.C.M. 706 board.

7           Conclusions of law, prereferral.

8           One, length of the delay. The accused was placed in  
9 pretrial restraint on 27 May 2010. His trial is scheduled to begin  
10 on 3 June 2013; thus, the accused will have been in pretrial  
11 confinement for slightly over 3 years when trial begins. This is a  
12 lengthy delay that triggers the bar for analysis. The length of  
13 delay in this case must consider the time necessary to investigate  
14 and prosecute a uniquely complex case such as this one involving  
15 rolling leaks of classified information by WikiLeaks, multiple  
16 classified administrative and law enforcement investigations, a  
17 voluminous amount of classified information and required coordination  
18 among the government and multiple agency equity holders to charge,  
19 disclose and use the classified information at trial.

20           Two, accused demand for speedy trial. On 9 and 13 January  
21 2011 and again on 25 July 2011, the accused demanded a speedy trial.  
22 Thus, as of 9 January 2011, the government was on notice that the  
23 accused wanted a speedy trial.

1           Three, prejudice to the accused. The accused has been  
2 restrained since 27 May 2010. The prejudice prong of the bar for  
3 speedy trial analysis was designed: one, to prevent oppressive  
4 pretrial incarceration; two, to minimize anxiety and concern of the  
5 accused; and three, to limit the possibility that the defense will be  
6 impaired.

7           The defense argues that the accused was oppressively  
8 incarcerated at Marine Corps Brig Quantico and suffered increased  
9 anxiety beyond the norm while confined at Theatre Field Confinement  
10 facility in Kuwait and MCBQ.

11           The accused was in mental health treatment for anxiety  
12 before he went into pretrial confinement. As the accused's mental  
13 health deteriorated in TFCF, the government expeditiously transferred  
14 the accused out of Theatre at the request of mental health  
15 professionals. While this Court held on 7 January 2013, that the  
16 government's maintenance of the accused in prevention of injury, POI  
17 status for certain periods of time while at MCBQ, was excessive in  
18 relation to the legitimate government interest in preventing injury,  
19 the Court granted the accused 112 days sentence credit for violation  
20 of Article 13, UCMJ. The Court also notes the accused was in MCBQ  
21 from 28 July 2010 to 20 April 2011, the period of the R.C.M. 706  
22 board proceedings were continued at the request of the defense.

1           Since 21 April 2011, the accused has been confined at the  
2 Joint Regional Confinement Facility (JRCF) at Fort Leavenworth,  
3 Kansas, in medium custody. Other than the length of confinement  
4 itself, the Court does not find the accused was in oppressive  
5 confinement or suffered undue anxiety beyond the normal incidents of  
6 confinement. The Court finds no evidence the defense will be  
7 impaired from the delay.

8           Four, reasons for the delay: 27 May 2010 to 22 April 2011.  
9 Between 29 May 2010 and 28 July 2010, the accused was confined in  
10 Kuwait, a deployed theatre. His mental health was deteriorating to  
11 the point where he was placed on one-point-one suicide watch on 30  
12 June 2010. The government was working to find a more stable  
13 confinement facility that was not in a deployed theatre and had  
14 adequate mental health facilities and providers to treat the accused.  
15 On 28 July 2010, the accused was transferred to MCBQ and jurisdiction  
16 of the case was transferred to MDW.

17           The original Article 32 hearing was scheduled for 14 July  
18 2010. On 11 July 2010, the defense requested a delay in the Article  
19 32 hearing for an R.C.M. 706 evaluation of the accused. On 12 July  
20 2010, the defense requested a delay in the Article 32 Investigation  
21 for an R.C.M. 706 board, and until the accused made decisions on  
22 retaining civilian counsel and civilian experts. The accused  
23 retained civilian counsel on 25 August 2010.

1           The Special Court-Martial Convening Authority approved the  
2 R.C.M. 706 board. The board president advised the parties the board  
3 would begin on 27 August 2010. On 25 August 2010, the defense  
4 requested a delay in the R.C.M. 706 board until a forensic  
5 psychiatrist was appointed to the defense team. On 26 August 2010,  
6 the defense requested a delay in the R.C.M. 706 board until  
7 procedures could be adopted to safeguard any classified information  
8 that would be disclosed during the board's determinations. On or  
9 about 2 September 2010, the defense requested TS-SCI security  
10 clearances for each defense member to include experts.

11           On 17 September 2010 and 22 September 2010, the Special  
12 Court-Martial Convening Authority ordered a preliminary  
13 classification review (PCR). This review conducted by the defense  
14 security expert was completed on 13 December 2010. At that time, the  
15 original R.C.M. 706 board members remained on the board. The  
16 president purposed to substitute the third member who had more time  
17 to devote to the board.

18           As a result of the PCR, TS-SCI clearances were processed  
19 for the R.C.M. 706 board members. The clearances were approved on 31  
20 January 2011, and the Special Court-Martial Convening Authority  
21 ordered the board to resume on 3 February 2011. The board scheduled  
22 tests and an unclassified interview with the accused on 16 and 17  
23 February 2011, with a classified interview on 1 March 2011.

1           On 21 February 2011, the defense advised the government it  
2 wished to interview the accused before the R.C.M. 706 board conducted  
3 its classification interview. Coordinating with defense, the defense  
4 interview prior to the R.C.M. 706 board interview caused delay in  
5 scheduling the R.C.M. 706 interview.

6           The Court finds the government acted diligently in the  
7 transfer of the accused to MCBQ and the processing of the R.C.M. 706  
8 board. The delay resulting from the completion of the R.C.M. 706  
9 board from 3 March 2011 until 22 April 2011, was reasonable in light  
10 of the scheduling conflict resulting from the defense request to  
11 interview the accused prior to the classification -- classified  
12 interview with the R.C.M. 706 board.

13           While the R.C.M. 706 board was awaiting the results of the  
14 PCR, the government was moving the case forward in other respects.  
15 The CCIU investigation was uncovering additional alleged misconduct  
16 involving classified information by the accused that was not in the  
17 original charges. The government was working with investigators to  
18 understand the extent of the alleged misconduct and with other  
19 agencies to include the Department of State, Department of Defense  
20 and OGA 1 to determine which disclosures of classified information  
21 should be charged and to obtain approvals to charge that information.

22           The government requested OCA reviews of classified  
23 information in the 5 July 2010, charges. On or about 3 November



1 2010, additional digital media was discovered by a search of the  
2 accused's aunt's home. The evidence clearly shows the government was  
3 acting diligently to move the case forward from 25 May 2010, when the  
4 government learned of the alleged disclosure of classified  
5 information by the accused, to 22 April 2011.

6           Reasons for the delay: 23 April 2011 to 16 December 2011.  
7 The reasons for the delay for this period are set forth above in the  
8 government delay portion of the R.C.M. 707 analysis.

9           Five, balancing the four factors.

10           On balance the reasons for the delay justify the length of  
11 the delay. This is a complex case involving multiple government  
12 agencies and entities and which requires an almost unfathomable  
13 amount of coordination and manpower. The accused is charged with  
14 stealing more than 700,000 documents from classified databases. The  
15 conduct giving rise to the charges resulted in reaction by over 60  
16 governmental organizations. Classified information posted to  
17 WikiLeaks was not released on a single day, but continued for 18  
18 months, starting and restarting the criminal investigation and agency  
19 reaction.

20           In order to prove the majority of the specifications, the  
21 government had to prove the classification of the charged -- has to  
22 prove the classification of the charged documents at the time of the  
23 offense. The classification review was a necessary step toward that

1 end; therefore, the classification reviews were necessary for the  
2 Article 32 Investigation and the Article 32 IO considered the  
3 classification reviews in order to determine whether information  
4 charged was properly classified.

5         The Court is not persuaded that the complexity of the case  
6 hinges on government's charging decisions. Indeed, the breadth of  
7 the alleged misconduct and the number of governmental organizations  
8 affected is what makes this case complex and unprecedented.  
9 Furthermore, the nature of the evidence and documents in this case,  
10 classified information emanating from often overlapping OCAs, compels  
11 a finding by this Court that the delay was not for an unreasonable  
12 length of time in light of the reasons for the delay.

13         The government assiduously worked to bring this case to  
14 trial. Prior to 11 March 2011, the government made information  
15 requests to each organization with ownership of charged information  
16 for classification reviews of that information. These informal  
17 requests were perfected in written memoranda to each of the OCAs on  
18 18 March 2011, and approximately every 30 days thereafter.

19         The government diligently and repeatedly educated the OCAs  
20 about the accused's speedy trial rights and warned of the dangers of  
21 noncompliance. The government set short suspense dates for the OCAs  
22 to complete their classification reviews; however, the government had  
23 no mechanism to enforce those suspense dates.

1           In addition, the government frequently requested updates  
2 from the OCAs on the classification review process. The government  
3 was coordinating among multiple federal agencies to obtain permission  
4 to disclose classification reviews; charged documents; classified  
5 charged documents; classified evidence, including digital media and  
6 audit data or logs collected from SIPRNET systems; and classified  
7 damage assessments, which often contain synthesized information  
8 requiring significant interagency coordination.

9           Both the complexity of the case and highly classified  
10 nature of the evidence, provided the good cause for the reasonable  
11 period of delay. There's no evidence the delay was an effort to gain  
12 a tactical advantage over the accused or that the government could  
13 have gone to trial earlier, but negligently or spitefully refused to  
14 do so.

15           Post referral. The defense maintains that the government  
16 violated Article 10 by impeding defense discovery and taking the  
17 following meritless positions throughout the discovery in this case:

18           A. Maintaining that *Brady* does not require the government  
19 to turn over documents that are relevant to punishment.

20           B. Maintaining that R.C.M. 701 does not apply to  
21 classified discovery.

22           C. Disputing the relevance of facially relevant items,  
23 such as damage assessments.

1           D. Using R.C.M. 703 standard instead of the appropriate  
2 R.C.M. 701 standard when dealing with items in the military's  
3 possession, custody and control.

4           E. Referring to damage assessments and other documents as  
5 "alleged to frustrate the defense's access to them."

6           F. Maintaining the Department of State and ONCIX had not  
7 completed a damage assessment.

8           G. Maintaining it was "unaware of forensic results and  
9 investigative files."

10          H. Resisting production of Department of State damage  
11 assessment under authority "of *Giles v. Maryland* 386 U.S. 66 at 117,  
12 1967, which provided no legal support for its position."

13          I. Despite understanding the defense discovery requests  
14 defining "damage assessments" and "investigations" to avoid producing  
15 discovery. After instructing the defense that it should not use the  
16 term "damage assessments" to refer to informal reviews of harm,  
17 instead using the term "working papers," then referring to working  
18 papers as "damage assessments."

19          J. Insisting on a threshold of specificity for *Brady*  
20 requests that does not exist or some additional showing of relevance.

21          K. Maintaining that the FBI investigative file was not  
22 material to the preparation of the defense.

1 L. Maintaining that anything produced that predated the  
2 Department of State damage assessment was not discoverable because it  
3 was likely cumulative.

4 M. Arguing with the Court at length about whether the  
5 government wasn't required to turn over documents that were obviously  
6 material to the preparation of the defense, absent a specific  
7 request.

8 N. Waiting until 2 days before the defense's Article 13  
9 motion before reviewing 1,374 e-mails from Quantico, which it had in  
10 its possession for over 6 months. The defense avers that the  
11 government advanced each of these positions in an attempt to  
12 frustrate the defense's access to discoverable information, causing  
13 delay in the defense receiving discovery and delay in the time taking  
14 to litigate the discovery issues.

15 The defense further maintains that the government violated  
16 Article 10 by causing the following discovery delays:

17 One, the government's failure to search its own files in a  
18 timely manner.

19 Two, the government's failure to conduct a timely *Brady*  
20 search of the files of nonmilitary agencies.

21 Three, the government's failure to review any discovery  
22 from the Department of State for nearly 2 years.

1 Four, that the government's "discovery of the FBI impact  
2 statement, DHS damage assessment and OGA 1's second damage  
3 assessment.

4 In its reply brief the defense also alleges that the delay  
5 has been caused by DoS requirements that have prohibited the defense  
6 from interviewing Department of State witness.

7 Findings of fact post referral.

8 This case was referred on 3 February 2012. Prior to the  
9 referral the defense filed the following discovery requests: 29  
10 October 2010, 1 November 2010, 15 November 2010, 8 December 2010, 10  
11 January 2011, 19 January 2011, 16 February 2011, 17 February 2011, 13  
12 May 2011, 25 May 2011, 21 September 2011, 13 October 2011, 15  
13 November 2011, 16 November 2011 and 20 January 2012.

14 Some of the particular requests were specific. For  
15 example, on 15 November 2010, Request H, the results of SA Calder L.  
16 Robertson III and SA David S. Shaver's analysis of any computers  
17 analyzed in this case, as well as copies of any investigative notes  
18 or assessments by CCIU; additionally, the names of all individuals  
19 from CCIU or any other government agency that have performed or are  
20 performing computer analysis.

21 Other particular requests were not specific and were  
22 overbroad. For example, 8 December 2010, Request F. Any assessment  
23 given or discussions concerning WikiLeaks disclosures by any member

1 of the government to President Obama; any e-mail, report, assessment,  
2 directive or discussion by President Obama to Departments of Defense,  
3 State or Justice.

4           On 16 September 2011, the defense requested access to all  
5 classified information that the government intended to use in this  
6 case, to include any damage assessment or information review  
7 conducted by any government agency or at the direction of any  
8 government agency.

9           On 13 October 2011 and 1 November 2011, the defense  
10 reiterated its discovery request for damage assessments of the  
11 alleged leaks from the government agencies. On 16 November 2011, the  
12 defense also asked for damage assessments.

13           On 20 January 2012, the defense requested the government  
14 answer the following questions:

15           A. Does the government possess any report, damage  
16 assessment or recommendation by the WikiLeaks taskforce or any other  
17 CIA member, information review taskforce, DoJ, DoS, ODNI, DIA, ONCIX  
18 concerning the alleged leaks in this case? If yes, please indicate  
19 why these items have not been provided by the defense. If no, please  
20 indicate why the government has failed to secure these items.

21           B. Does the government request -- possess any report,  
22 damage assessment or recommendation as a result of any joint  
23 investigation with the Federal Bureau of Investigation or any other

1 government agency concerning the alleged leaks in this case? Same  
2 yes/no follow-up as in A.

3 On 12 April 2011, the government responded to the 1  
4 November 2010, discovery request for damage assessments that, "The  
5 United States is not currently in possession of this information and  
6 will make a determination whether to provide the information when it  
7 becomes available."

8 On 27 January 2012, the government replied to the defense  
9 discovery requests and the above question. In response to the  
10 request for all damage assessments conducted by OCAs the government's  
11 response was, "The United States will provide a response to this  
12 request no later than 3 February 2012."

13 On 31 January 2012, the government replied to the defense  
14 discovery request for damage assessment by OCAs and government  
15 agencies, "The United States will not provide the requested  
16 information. The defense has failed to provide an adequate basis for  
17 its request. The defense is required to renew its request with more  
18 specificity and an adequate basis for its request."

19 On 6 October, the government submitted written requests to  
20 the Department of State, FBI, ODNI, OGA 1, and OGA 2 to review any  
21 alleged damage assessments. Most of the damage assessments are  
22 classified and many of those damage assessments, particularly those  
23 produced by the intelligence community contain classified information



1 synthesized from other government organizations requiring significant  
2 interagency coordination to disclose to the defense. The request to  
3 review the DoS damage assessment was denied. The government was not  
4 authorized to review the Department of State damage assessment until  
5 17 April 2012.

6           On 29 July 2011, the IRTF submitted its final report. On  
7 25 October 2011, the government requested approval to disclose the  
8 classified IRTF final report to the defense. DIA reviewed the report  
9 and identified multiple government organizations with equities in the  
10 report. The prosecution coordinated with multiple government  
11 organizations along with the DIA for approval to disclose the entire  
12 report to the defense. The government moved the Court to approve a  
13 substitution on 18 May 2012.

14           The government learned of the DHS damage assessment on 19  
15 October 2011, and reviewed it on that day. The government notified  
16 the defense, but not the Court, of the damage assessment orally on 8  
17 June 2012, and disclosed it to the defense on 13 June 2012.

18           On 14 September 2012, the government moved for limited  
19 disclosure M.R.E. 505(g)(2) of the -- of a DHS document. The Court  
20 conducted in camera review of the document and approved the  
21 redaction. The government provided the DHS document to the defense  
22 on 25 October 2012.

1           On 12 July 2012, the government learned that the CIA  
2   created a follow-on damage assessment and notified the Court. The  
3   government reviewed the report on 13 July 2012.

4           The government learned the FBI prepared an impact statement  
5   on 2 November 2011, and authorized the government to review it. The  
6   government conducted a cursory review on 2 November 2011, and  
7   reviewed the entire impact statement for discovery on 18 April 2012.  
8   The government notified the Court and the defense of the impact  
9   statement on 31 May 2012. The government did not have authority to  
10   disclose the impact statement to the defense prior to referral. The  
11   government filed an M.R.E. 505(g) motion for limited disclosure. The  
12   Court ruled on the motion on 19 July 2012, and the government  
13   disclosed the redacted impact statement to the defense on 2 August  
14   2012.

15           On 19 April 2011, 28 July 2011, and 15 August 2011, the  
16   government requested approval to disclose the FBI case file and its  
17   sub files relevant to the accused to the defense. The FBI case file  
18   is classified. The FBI provided the prosecution with a copy of the  
19   FBI file relating to the accused on 25 August 2011, for the sole  
20   purpose of reviewing for exculpatory impeachment material.

21           On 2 January 2012, the government requested a meeting with  
22   the FBI to discuss discovery. On or about 1 February 2012, the  
23   government completed its review of the FBI file related to the

1 accused. On 7 February 2012, the government began negotiating with  
2 the Department of Justice and the FBI to disclose all requested  
3 information to the defense. The FBI would not approve disclosure to  
4 the defense absent a military judge to issue a protective order. The  
5 Court signed the protective order in this case on 16 March 2012. The  
6 government disclosed the approved FBI file to the defense and the  
7 remaining information on 12 April 2012, 15 May 2012 and 21 May 2012.  
8 On 22 June 2012, the Court granted the defense Motion to Compel  
9 Number 2 for FBI files minus Grand Jury testimony.

10 On 3 August 2012, the government filed a motion to  
11 authorize limited disclosure under M.R.E. 505(g)(2). On 21 August  
12 2012, the Court, after conducting an *ex parte* review of the FBI file,  
13 ordered the government no later than 14 September 2012, to identify  
14 numerically each proposed redaction by Bates number and provide the  
15 Court with a justification for each proposed redaction and to  
16 identify whether each proposed redaction has been made available to  
17 the defense from another source.

18 On 14 September 2012, the government filed a supplemental  
19 M.R.E. 505(g)(2) motion with the Court. On 25 October 2012, the  
20 government produced the Court approved FBI files for the defense.

21 At or near 15 December 2011, the Court advised the Article  
22 32 IO that the damage assessments were classified and the government  
23 did not have authority to discuss the substance of the damage

1 assessment reports and all but the IRTF are not under the control of  
2 military authorities. The government did not have authority to  
3 disclose any of the damage assessments to the defense prior to  
4 referral on 3 February 2012.

5           The Court set this case for arraignment on 23 February  
6 2012. At the arraignment the defense filed a motion to compel  
7 depositions, the request for a bill of particulars and a motion to  
8 compel discovery, all dated 16 February 2012. The Court set these  
9 motions on the calendar for the first substantive Article 39(a)  
10 session on 15 and 16 March 2012. The Court also signed the  
11 protective order for classified information on 16 March 2012.

12           Prior to ruling on the defense's motion to compel discovery  
13 the Court was unclear on the existence and the status of the damage  
14 assessments at issue. At the Article 39(a) session on 15 and 16  
15 March 2012, the government responded that it did not have authority  
16 to confirm or deny the existence of the damage assessments. To  
17 clarify the record, the Court via e-mail asked the government the  
18 following questions and received the following responses:

19           One: Is each damage assessment in the possession, control  
20 or custody of military authorities?

21           Government response: Defense Intelligence Agency and  
22 Information Review Taskforce, yes. The classified information itself  
23 is in the possession of military authorities; however, the document

1 contains material from other agencies and departments outside the  
2 control of military authorities. The military controls the document  
3 itself, but not the information within its four corners.

4 Wikileaks Taskforce, no. The Department of State (DoS) has  
5 not completed a damage assessment.

6 Office of National Counter Intelligence Executive (ONCIX).  
7 ONCIX has not produced any interim or final damage assessments in  
8 this matter.

9 Two: If no, what agency has custody of the damage  
10 assessments?

11 Government response: WTF the Central Intelligence Agency  
12 has possession, custody and control.

13 Three: Does the prosecution have access to the damage  
14 assessments?

15 Government response: DIA and IRTF, the prosecution was  
16 given limited access for the purpose of reviewing for any  
17 discoverable material. The prosecution only has control of the  
18 information within the document that's owned by the Department of  
19 Defense military authority. WTF the prosecution was given very  
20 limited access for the purpose of reviewing for preparation of the  
21 previous motions hearing. The prosecution will have future access to  
22 complete a full review for *Brady* as outlined below.

1 Four: Has the prosecution examined each damage assessment  
2 for *Brady* material?

3 Government response: DIA and IRTF, yes. WTF, no.

4 Four a: If yes, is there any favorable government  
5 material?

6 Government response: DIA and IRTF, yes; however, the  
7 United States has found only one classified -- only classified  
8 information that is favorable to the accused that is material to  
9 punishment, citing *Cone v. Bell*, 129 Supreme Court 1769 at 1772,  
10 2009. See also *Brady v. Maryland*, 373 U.S. 83 at 87, 1973. The  
11 United States has not found any favorable material relevant to  
12 findings.

13 Four b: If not, why not?

14 Government response: WTF, the prosecution has only  
15 conducted a cursory review of the damage assessment in order to  
16 understand what information exists within the agency. It has not  
17 conducted a detailed review for *Brady* material. This process is  
18 ongoing and the prosecution will produce all "evidence favorable to  
19 the accused" that is material to guilt or punishment "if it exists  
20 under the procedures outlined in *M.R.E. 505 Cone v. Bell*, 129 Supreme  
21 Court at 1772. See also *Brady v. Maryland*, 373 U.S. at 87.

22 Additionally, the United States is working with other  
23 federal organizations for which we have good faith basis to believe

1 may possess damage assessments or impact statements and will make  
2 such discoverable information available to the defense under M.R.E.  
3 505.

4           Based on the responses the government gave to the questions  
5 of the Court on 23 March 2012, the Court ruled on the defense motion  
6 to compel discovery requiring the government to produce the IRTF, WTF  
7 and DoS damage assessments for in camera review by 18 May 2012. The  
8 Court did not require an ONCIX damage assessment to be produced for  
9 in camera review because response by the government led the Court to  
10 believe that an ONCIX damage assessment did not exist.

11           Prior to answering the Court's questions, the government  
12 had telephonic and e-mail communication with ODNI answering for ONCIX  
13 regarding the status of any ONCIX damage assessment. A response was  
14 "To date ONCIX has not produced any interim or final damage  
15 assessment in this matter. ONCIX is tasked with preparing a damage  
16 assessment; however, the damage assessment draft is currently a draft  
17 and is incomplete and continues to change as information is compiled  
18 and analyzed. Damage assessments can take months, even years to  
19 complete and given the sheer volume of disclosures in this case, we  
20 do not know when a draft product will be ready for coordination much  
21 less dissemination."

1           ODNI did not authorize the government the authority to  
2 provide the language below the first sentence to the Court:  
3 Government Interrogatory, question 218.

4           In response to the defense motion to compel discovery, in  
5 an e-mail to the Court and during oral argument, the government  
6 argued that R.C.M. 701 does not apply to classified discovery. This  
7 resulted in the defense filing a motion to dismiss on 15 March 2012.  
8 The Court denied the motion to dismiss on 25 April 2012, ruling as  
9 follows:

10           One, in a trial by general court-martial in the military  
11 justice system, charges are preferred against an accused, the charges  
12 are investigated at an Article 32 -- by an Article 32 Investigating  
13 Officer and forwarded with recommendations to the Convening Authority  
14 who makes a decision whether to refer the case to trial: R.C.M. 307,  
15 405, 406, 407, 504 and 601.

16           Two, in this case the original charges were preferred on 5  
17 July 2010, and dismissed by the Convening Authority on 18 March 2011.  
18 The current charges were preferred on 1 March 2011. The Article 32  
19 Investigation was held 16 through 22 December 2011, and the Convening  
20 Authority referred the current charges to trial by general court-  
21 martial on 3 February 2012.



1           Unlike trials in federal district court, a military judge  
2 is not detailed to a court-martial until a case is referred. This  
3 case was referred on 3 February 2012, Article 26(a), UCMJ.

4           Four, R.C.M. 701 and R.C.M. 703 govern discovery and  
5 production of evidence after a case has been referred for trial by  
6 the Convening Authority and a military judge has been detailed.

7           Five, the President promulgated R.C.M. 701 to govern  
8 discovery and R.C.M. 703 to govern evidence production after  
9 referral. The rules work together when the production of evidence is  
10 not in the control of military authorities and is relevant and  
11 necessary for discovery: *United States v. Graner*, 69 M.J. 104 Court  
12 of Appeals for the Armed Forces, 2010.

13           The requirements for discovery or production of evidence  
14 are the same for classified and unclassified information under R.C.M.  
15 701 and 703 unless the government moves to limit the disclosure under  
16 M.R.E. 505(g)(2), or claims the M.R.E. 505 privilege for classified  
17 information. If the government voluntarily discloses classified  
18 information for the defense, the protective order and limited  
19 disclosures provisions of M.R.E. 505(g) apply.

20           If after referral the government invokes the classified  
21 information privilege, the procedures of M.R.E. 505(f) and (i) apply.

22           Six, from 8 March 2012 -- the 8 March 2012, government  
23 response to the defense motion to compel and its e-mail on 22 March

1 2012, the Court finds that the government believed R.C.M. 701 did not  
2 govern disclosure of classified information for discovery or no  
3 privileges have been invoked under M.R.E. 505. This was an incorrect  
4 belief. The Court finds that the government properly understood its  
5 obligation to search for exculpatory *Brady* material; however, the  
6 government disputed it was obligated to disclose classified *Brady*  
7 material that was material for punishment only. The Court finds no  
8 evidence of prosecutorial misconduct.

9           Seven, although the R.C.M. and military case law encourage  
10 early and open discovery, the defense does not have a right to  
11 discovery under R.C.M. 701 or *Brady* prior to referral on 3 February  
12 2012.

13           Eight, most of the information contained in the damage  
14 assessments requested by the defense is maintained by other  
15 government agencies. To obtain such information from other  
16 government agencies under R.C.M. 703(f)(4)(a), whether discoverable  
17 under R.C.M. 701 or not, requires the defense to show relevance and  
18 necessity. The government does not have authority to compel  
19 production of evidence from other government agencies under R.C.M.  
20 703(f)(4)(a) until after referral.

21           Nine, as the Court held in its 23 March 2012, ruling  
22 regarding a motion to compel discovery, the fact that information is  
23 controlled by another agency is discoverable under M.R.E. 701 may

1 make such information relevant and necessary under R.C.M. 703 for  
2 discovery.

3           Ten, the government has requested 13 departments, agencies  
4 and commands to segregate and preserve records involving WikiLeaks  
5 and requested information potentially discoverable from more than 50  
6 additional agencies. This is a complex case involving voluminous  
7 classified information in the custody of multiple government agencies  
8 who have a national security interest -- national security concern  
9 with the disclosure of this information. As of 12 April 2012, the  
10 government produced 2,729 unclassified documents consisting of 81,273  
11 pages and 41,550 classified documents totally 336,641 pages. To  
12 secure this release, the government coordinated with multiple  
13 government agencies to ensure protective orders under M.R.E. 505(g)  
14 and court orders for releasing grand jury matter.

15           It is not unreasonable that the government agencies  
16 possessing potentially discoverable classified information to await  
17 detail of a military judge to litigate issues of relevance,  
18 materiality and necessity, and subsequently to litigate issues  
19 arising under M.R.E. 505 and 506 prior to releasing classified  
20 information for the trial counsel to disclose to the defense.

21           Twelve, the government moved to compel the discovery it  
22 desires on 14 February 2 -- on 16 February 2012. Eleven days after  
23 referral, on 23 March 2012, the Court ordered the government to

1 immediately begin the process of producing the damage assessments for  
2 in camera review to assess whether they are favorable or material to  
3 the preparation of the defense under R.C.M. 701(a)(6), R.C.M.  
4 701(a)(2) and *Brady*; to immediately cause inspection of the 14 hard  
5 drives; to contact DoS, FBI, DIA, ONCIX and CIA to determine whether  
6 any of those agencies contained forensic results or investigative  
7 files relevant to this case; to advise the court by 20 April 2012,  
8 whether it anticipates any government entity that is a custodian of  
9 classified information subject to the defense motion to compel will  
10 seek limited disclosure in accordance with M.R.E. 505(g)(2) or claim  
11 a privilege in accordance M.R.E. 505(c); and by 18 May 2012, to  
12 disclose any favorable unclassified information from the predamage  
13 assessments to the defense and all classified information from the  
14 predamage reports to the Court for in camera review.

15           Thirteen, the parties proposed trial schedule anticipates  
16 trial taking place between late September and November 2012, absent  
17 an unanticipated filing of additional motions. Litigations of  
18 disputed discovery is taking place well before trial. There's no  
19 *Brady* violation in this case. That was the Court's ruling at that  
20 time.

21           The Court published its first scheduling order on 25 April  
22 2012. As with each subsequent scheduling order, the schedule was  
23 coordinated with and agreed to by the parties. The Court received

1 "reply responses" from the parties on the eve of the 15, 16 March  
2 2012, Article 39(a) session. The parties advised the Court that they  
3 wanted to continue to file replies, thus time was built into the  
4 schedule. This and each subsequent trial schedule had an  
5 approximately 6-week timeframe: 2 weeks for filings, 2 weeks for  
6 responses, 5 days for replies and a week for the Court to consider  
7 all the files. The 25 April 2012, calendar scheduled the trial 25  
8 September to 12 October 2012.

9           The government has consistently maintained it would need 45  
10 to 60 days to process defense M.R.E. 505(h) notices and it would need  
11 60 days' notice prior to trial because of the number of witnesses to  
12 coordinate schedules.

13           The next Article 39(a) session to litigate motions was 6 to  
14 8 June 2012.

15           A. On 10 May 2012, the government filed a motion to  
16 reconsider the Court's ruling to compel production of Department of  
17 State damage assessment for in camera review because that damage  
18 assessment was a draft. On 11 May 2012, the Court granted the  
19 government's motion to reconsider and denied the motion to find that  
20 the draft damage assessment is not discoverable.

21           On 24 May 2012, the government wrote a letter to the Deputy  
22 General Counsel of ODNI requesting access to the most recent version  
23 of the ONCIX damage assessment because of the Court's ruling that the

1 DoS draft damage assessment was discoverable would also apply to the  
2 ONCIX damage assessment draft.

3           On 30 May 2012, ODNI responded to the government that ODNI  
4 expected a coordinated version of the draft assessment to be  
5 available by 13 July 2012, and it was their strong preference that  
6 government review take place on or after that date to avoid the need  
7 to review multiple versions of the draft.

8           On 31 May 2012, the government notified the Court that  
9 there was draft ONCIX damage assessment that would be made available  
10 no later than 3 August 2012, the date in the 25 April 2012,  
11 scheduling order for the next production of compelled discovery. The  
12 government moved for M.R.E. 505(g) limited disclosure of the ONCIX  
13 damage assessment, which was granted by the Court. The damage  
14 assessment was disclosed to the defense on 23 August 2012.

15           B. On 10 May 2012, the defense filed a motion to compel  
16 discovery Number 2, and 30 May 2012, supplement to the motion to  
17 compel discovery, scheduled among the motions for litigation 6 to 8  
18 June 2012. In the supplement to the motion the defense requested the  
19 Court produce Department of State witnesses to testify about the  
20 following subject to clarify the record about what Department of  
21 State information exists that may be discoverable.

22           On 4 June 2012, the Court ordered Department of State  
23 witness to appear and testify during the 6 to 8 June 2012, Article

1 39(a) session. On or about 8 June 2012, the government moved the  
2 Court to delay ruling on the defense motion to compel discovery  
3 Number 2 to search for the DoS records requested by the defense. The  
4 Court granted the motion on 8 June 2012, and ruled on the defense  
5 motion to compel Number 2 on 22 June 2012. The Court granted the  
6 defense motion in part and ruled in favor of the government in part.  
7 The Court ordered the government to advise the court if any agency  
8 would seek limited disclosure under M.R.E. 505(g)(2) or claim a  
9 privilege by 25 July 2012, and order the production of discoverable  
10 material not involving M.R.E. 505 on 3 August 2012. The Court  
11 clarified its ruling on 25 June 2012.

12 C. On 10 May 2012, the defense filed a motion for due  
13 diligence and for a 2 to 3-month continuance after receipt of  
14 completed discovery until the start of trial. The motion was not on  
15 the case calendar. Part of the defense motion was a 17 April 2012,  
16 Memorandum for Principal Officials HQDA, stating, "It was only  
17 recently determined that no action had been taken by HQDA pursuant to  
18 the 29 July 2011, memorandum from DoD OGC to HQDA requesting it task  
19 principal officials to search for and preserve any discoverable  
20 information.

21 On 25 June 2012, the Court granted the motion and ruled it  
22 would provide a reasonable continuance to the defense upon receipt of  
23 compelled discovery to prepare their case. The Court opined, "This

1 is a complex case involving multiple federal government agencies and  
2 entities. The Court is not clear what identifiable files pertaining  
3 to PFC Manning relevant to this case are maintained by various  
4 agencies. What inquiries the government has made to discover the  
5 existence of agency files pertaining to PFC Manning, when the  
6 government became aware of the existence of particular agency files  
7 and what files the government has examined under R.C.M. 701(a)(6),  
8 *Brady* and/or R.C.M. 701(a)(2). This Court must rule upon motions to  
9 compel discovery that have been filed in this case in a speedy trial  
10 motion to be filed by the defense. One government -- one document  
11 containing the information will assist the Court in addressing  
12 discovery and speedy trial issues." The Court found no lack of due  
13 diligence by the government and reserved ruling on that issue until  
14 this speedy trial litigation.

15 With respect to the 17 April 2012 memorandum, the  
16 government submitted its initial prudential search request to DoD on  
17 25 May 2011, and 6 June 2011, through the Department of Defense,  
18 Office of General Counsel (DoD, OGC).

19 On 29 July 2011, DoG OGC disseminated the PSR to all  
20 relevant DoD departments to include HQDA. The government worked  
21 through the office of the Judge Advocate General (OTJAG) as a conduit  
22 to HQDA. On 4 October 2011, the government obtained files from the  
23 Joint Staff responsive to the PSR. Because the government was



1 preparing its 8 to 9 November and 18/19 November 2011, briefings for  
2 the accused and the defense and for the 16 through 23 December 2011,  
3 Article 32 hearing, the government did not review the DoD files until  
4 5 January 2012.

5           During this review the government learned that the HQDA  
6 information was not within the DoD material. The government  
7 contacted DoD on 5 January 2012, and OTJAG on 10 January 2012. OTJAG  
8 sent the 17 April 2012, memorandum to HQDA. On 27 April 2012, the  
9 government obtained files responsive to the PSR from the Army G2. On  
10 11 May 2012, the government received the HQDA responsive to the  
11 request. The government reviewed the files and disclosed *Brady* and  
12 discovery materials to the preparation of the defense to the defense.

13           Although MDW and HQDA are Army entities, HQDA files are MDW  
14 files. There is no negligence on the part of government with respect  
15 to HQDA files.

16           The next Article 39(a) session took place between 16 and 19  
17 July 2012. On 9 July 2012, the government filed a motion notifying  
18 the Court that the volume of Department of State records gathered  
19 pursuant to the 22 June 2012, order of the Court: 5,000 documents  
20 and most of it classified. The government moved the Court not to  
21 compel discovery or to grant the government 45 to 60 days to review  
22 the information and determine whether to seek limited disclosure or  
23 invoke a privilege. The defense opposed.

1           On 19 July 2012, the Court granted the defense's motion to  
2 compel discovery of Department of State records and ordered the  
3 government to disclose all discoverable information to the defense by  
4 14 September 2012, or submit the discoverable information to the  
5 Court for a limited disclosure under M.R.E. 505(g)(2) or invoke a  
6 privilege under M.R.E. 505(c).

7           After the Article 39(a) session concluded the parties and  
8 the Court met in an R.C.M. 802 session to discuss the Court's  
9 schedule in order to split the Article 13 and speedy trial motions to  
10 separate Article 39(a) sessions. The parties and the Court agreed to  
11 new Article 39(a) and trial dates, with trial scheduled 4 through 22  
12 February 2013. This Court's schedule was not memorialized as an  
13 Appellate Exhibit.

14           The next Article 39(a) session was scheduled 27 to 31  
15 August 2012. The Article 13 motion was scheduled for litigation.  
16 The filing deadline for the defense Article 13 motion was 27 July  
17 2012. The defense had advised the Court that civilian defense  
18 counsel would be out of town 27 July to 9 August 2010, for 2 weeks on  
19 a personal matter and would have limited access to automation.

20           On 26 July 2010, the government sent the defense 84 e-mails  
21 regarding Quantico Marine Corps Brig -- Marine Corps Brig Quantico,  
22 excuse me. There was an additional 12 -- the government sent the  
23 defense 84 e-mails regarding MCBQ. There was additional 1,294 e-

1 mails not disclosed to the defense. The government received the e-  
2 mails from 2 June 2011 to 5 December 2011, but did not review them  
3 until 25 July 2012, to look for *Giglio* material. In its 8 December  
4 2010, discovery request at M, the defense requested "Any and all  
5 documentation or observation notes by employees of the Quantico  
6 Confinement Facility related to PFC Manning." As the defense had  
7 referenced e-mails in another section of the discovery request and  
8 did not specifically reference e-mails in this one, the government  
9 did not consider e-mails "documents" within R.C.M. 701(a)(2).

10           On 27 August 2012, the Court held an R.C.M. 802 session  
11 with the parties to discuss scheduling in light of the 84 e-mails.  
12 Also, on 27 July 2012, the defense filed a motion for continuance to  
13 have the Article 39(a) sessions after 27 to 31 August 2012, and the  
14 speedy trial filings continued for 2 weeks, with trial remaining as  
15 scheduled: 4 through 22 February 2013.

16           On 1 August 2012, the Court granted the motion. The new  
17 trial schedule is agreed to by both parties. Also, on 1 August 2012,  
18 the government requested a continuance from 3 August 2012 to 14  
19 September 2012, to disclose or obtain limited disclosure or invoke a  
20 privilege regarding information classified above the secret level  
21 owned by the CIA and DHS. After requiring the government to file a  
22 supplement pleading stating the particularity how review and

1   approvals differ for information classified above the Secret level,  
2   the Court granted the motion.

3           At the 27 to 31 August 2012, Article 39(a) session the  
4   parties and the Court conferred and modified the Court's scheduling  
5   order. The new scheduling order scheduled the next Article 39(a)  
6   session for 17/18 October 2012, and established new suspense dates  
7   for the speedy trial and Article 13 filings. The trial remained as  
8   scheduled to start on 4 February 2013.

9           The parties and the Court agreed that because of the  
10   potential length of the trial the government estimates 12 weeks, and  
11   the extent of logistics, administrative and security support the  
12   trial entails the trial should not take place over the 25 December  
13   through 1 January holiday period. Thus the parties and the Court  
14   agreed the trial should begin early enough in November to conclude by  
15   the holiday period or start after the holiday period.

16           On 1 August 2012, the defense submitted a discovery request  
17   to the government asking for all remaining Quantico e-mails. On 17  
18   August 2012, the defense submitted a motion to compel number 3 for  
19   the remaining Quantico e-mails. The government voluntarily 600 of  
20   them to the defense stating in their interrogatory response at  
21   question 439 that it was not until 17 August 2012, motion to compel,  
22   that the defense finally provided the specificity in its motion to

1 compel. On 14 September 2012, the Court granted the defense motion  
2 to compel number 3 except for 12 e-mails.

3 On 14 and 19 September 2012, the government filed motions  
4 for limited disclosure under M.R.E. 505(g) for Department of State  
5 records, DHS record, CIA information and the FBI file. On 28  
6 September, the Court ruled on these motions. The Court held *ex parte*  
7 Article 39(a) sessions with the government regarding the Department  
8 of State records on 2 October 2012, and the FBI file on 12 October  
9 2012. The government modified the M.R.E. 505(g) submissions in  
10 accordance with the Court's guidance and made the information  
11 available to the defense on or before 25 October 2012. This  
12 concluded the defense discovery -- the defense requested discovery  
13 litigation.

14 The following two Article 39(a) sessions were held on 17  
15 and 18 October 2012 and 7 and 8 November 2012. At each of these  
16 Article 39(a) sessions the trial schedule was modified upon agreement  
17 of the parties and the trial remained scheduled for 4 February 2013  
18 through 15 March 2013.

19 On 22 June the government filed its witness list in  
20 accordance with the case calendar. The Department of State had  
21 previously required the defense to file a *Touhy* notice prior to  
22 approving defense interviews of Department of State witnesses. On 23  
23 March 2012, the defense submitted a *Touhy* request to the Department

1 of State via e-mail. The government followed up with a digital copy  
2 on 26 March 2012. On 5 April 2012, the Department of State received  
3 a *Touhy* request. The government followed up approximately 10 times  
4 with the Department of State about the *Touhy* request. After the  
5 government filed its witness list on 22 June 2012, the defense -- the  
6 Department of State no longer required the *Touhy* letter and made its  
7 witnesses available to the defense. On 9 August the defense  
8 contacted the Department of State to schedule interviews. The  
9 attorney responsible was on leave.

10 On the 18 October 2012, Article 39(a) session the  
11 government documented the required M.R.E. 505 notice from the defense  
12 prior to interviewing witnesses about classified information. On 1  
13 November 2012, the Department of State e-mailed the defense to plan  
14 for witness interviews.

15 On 17 November 2012, the defense submitted notices -- a  
16 notice to the Court that it might renew its motion to compel  
17 witnesses or its motion to dismiss for violation of speedy trial and  
18 requested the parties discuss the way forward at the next Article  
19 39(a) session.

20 The next Article 39(a) session was held 27 November to 2  
21 December 2012, to address the Article 13 motion. It quickly became  
22 apparent that 7 days was not enough time to present all of the  
23 witnesses and evidence for the motion. The trial schedule was once

1 again modified by the parties and the Court to add two additional  
2 Article 39(a) sessions on 5 to 7 December 2012, and again on 10  
3 through 12 December 2012, for the Article 13 litigation. These  
4 changes were announced on the record without a new Appellate Exhibit  
5 prepared. The parties and the Court again conferred and developed a  
6 new trial schedule dated 20 December 2012. This trial schedule  
7 contained an A and a B schedule depending upon whether the defense  
8 filed and/or the Court granted a motion to compel speedy trial  
9 witnesses. The trial date for schedule A was 18 March to 26 April  
10 2013. The trial date for schedule B was 6 through 17 March 2013.

11           The last Article 39(a) session prior to going on record  
12 today was 16 January 2013. The parties realized the current trial  
13 schedule was not possible in light of the M.R.E. 505(h) notices  
14 required to be filed by the defense for both witness interviews and  
15 disclosure of classified evidence at trial. The government requires  
16 45 to 60 days to process M.R.E. 505(h) notices. At the request of  
17 the Court, the parties conferred and proposed the current trial  
18 schedule. This trial schedule provides for the defense to provide  
19 rolling 505(h) notices to the government with a final suspense date  
20 of 22 February 2013, and schedules the trial to begin on 3 June 2013.

21           The law post referral.

22           Although R.C.M. 701 and military case law encourage early  
23 and open discovery, the government's discovery obligations under

1 R.C.M. 701 or *Brady* do not arise prior to referral on 3 February  
2 2012. R.C.M. 701(a)(6) states that the government shall disclose  
3 information favorable to the defense as soon as practicable. In a  
4 case such as this one involving disclosure of classified information  
5 it is reasonable to interpret the soonest practicable to mean after  
6 referral. If the case is not referred there would be no need to  
7 disclose classified information that could reasonably cause harm to  
8 the United States to the defense.

9 Evidence favorable to the accused and material to guilt or  
10 punishment must be disclosed in sufficient time for the defense to  
11 use it at trial: *United States v. Behenna*, 71 M.J. 228, Footnote 10,  
12 Court of Appeals for the Armed Forces, quoting *DiSimone v. Phillips*,  
13 461 F 3rd 181 at 196, 97, Second Circuit 2006, recognizing there is  
14 no bright line rule for when a disclosure is timely. Rather, the  
15 question is whether the evidence was disclosed in sufficient time for  
16 an accused to take advantage of the information, a determination  
17 necessarily dependent on the totality of the circumstances.

18 As the Court held in its 23 March 2012, ruling on the  
19 defense motion to compel discovery, the fact that information is  
20 controlled by another agency is discoverable under R.C.M. 701 may  
21 make such information relevant and necessary under R.C.M. 703 to be  
22 produced for discovery. Most of the information contained in the  
23 damage assessment, FBI report and other discovery requested by the



1 defense is maintained by other government agencies. To obtain such  
2 information from other government agencies under R.C.M. 703(f)(4)(a),  
3 whether discoverable under R.C.M. 701 or not, requires defense to  
4 show relevance and necessity. The government does not have the  
5 authority to compel production of evidence from other government  
6 agencies under R.C.M. 703(f)(4)(a) until after referral.

7 Conclusions of law post referral.

8 The length of the delay, the request for speedy trial and  
9 prejudice facts follow the same analysis as for prereferral delay  
10 discussed above.

11 Reasons for the delay.

12 3 February 2012 to 3 June 2013, the government did not  
13 disclose damage assessment or other classified information request by  
14 the defense discovery requests prior to trial. The government did  
15 not have authority from equity holding agencies to disclose the  
16 information to the defense. It is reasonable for an equity holder of  
17 classified information to await the detail of a military judge to  
18 litigate issues of relevance, materiality and necessity and  
19 subsequently to litigate issues arising under M.R.E. 505 and 506  
20 prior to releasing classified discovery to the trial counsel for  
21 disclosure to the defense.

22 The government requested 13 departments, agencies and  
23 commands to segregate and preserve records involving WikiLeaks and

1 requested information potentially discoverable for more than 50  
2 agencies. This is a complex case involving voluminous classified  
3 information and the custody of multiple government agencies having  
4 national security concerns for the disclosure of the information. To  
5 date the government has produced 5 thousand, 2 hundred -- 526,366  
6 pages of discovery with 437 pages of classified discovery. Only  
7 3,435 pages contained M.R.E. 505(g)(2) or M.R.E. 701(g) redactions or  
8 substitutions. The government has not invoked a privilege over any  
9 of the information requested in discovery by the defense. The  
10 government has diligently engaged with the equity holding agencies to  
11 maximize disclosure of classified information to the defense.

12           The defense moved to compel discovery on 16 February 2012,  
13 11 days after referral. On 23 March 2012, the Court issued its  
14 ruling on the motion setting forth the Court's view of rules of  
15 discovery and the interplay between R.C.M. 701, R.C.M. 703 and M.R.E.  
16 505 in this case. The parties had clarity on the rules of discovery  
17 after 23 March 2012. The government has acted in accordance with the  
18 Court's rulings in discovery.

19           With respect to the ONCIX damage assessment, the  
20 government's response to the Court's questions left the Court with  
21 the impression there was no ONCIX damage assessment. In the prior  
22 contact with ONCIX and ODNI, the government was aware that ONCIX was

1   tasked with collecting information from federal agencies and drafting  
2   a damage -- its damage assessment.

3           Prior to the Court's 23 March 2012, ruling compelling  
4   production of the IRTF DoS and WTF damage assessment for in camera  
5   review, the government was not authorized by ONCIX or the Department  
6   of State to review -- to view what, if any, damage -- draft damage  
7   assessment these agencies had. The government was aware that the  
8   Department of State damage assessment was a draft. The government  
9   was not aware of the status of the ONCIX damage assessment whether it  
10   was a compilation of information or whether a draft had taken shape.

11          After the Court's 11 May 2012, ruling that a DoS,  
12   Department of State draft damage assessment was not exempt from  
13   discovery because it was a draft, the government wrote to ODNI on 24  
14   May 2012, advising them that the government believed the Court's  
15   ruling would apply to any damage assessment ONCIX had prepared.

16          On 31 May 2012, the government notified the Court that  
17   ONCIX had a draft damage assessment. This action by the government  
18   shows that the government was not seeking to mislead the Court  
19   regarding the ONCIX damage assessment.

20          The government's litigation positions were not frivolous or  
21   designed to spitefully thwart the defense's ability to obtain  
22   discovery. Both R.C.M. 701 and M.R.E. 505 envision discovery  
23   litigation taking place during pretrial litigation. Both parties are

1 allowed to advance their positions. In this case the Court has  
2 rejected the positions taken by both sides. For example, the Court  
3 rejected the government's position that a draft damage assessment is  
4 not discoverable. The Court also rejected the initial position  
5 advanced by the defense that the government must produce all  
6 discovery requested by the defense for in camera review by the Court  
7 regardless of relevance. In a case such as this one with the volume  
8 of classified information at issue held by multiple equity holders,  
9 that could be potentially discoverable, protracted discovery  
10 litigation is almost inevitable.

11           Neither the government nor the Department of State  
12 intentionally impeded defense's access to witness by requiring *Touhy*  
13 notices. Once the 22 June 2012, witness list was filed by the  
14 government, the Department of State no longer required the notices.  
15 The Department of State e-mailed the defense on 1 November 2012, to  
16 coordinate witness interviews. Those interviews have been taking  
17 place in January and February 2013.

18           The Court finds that the government was not negligent with  
19 respect to the Department of State damage -- Department of Homeland  
20 Security damage assessment, the FBI impact statement, discovery of  
21 CIA's creation of a follow-on damage assessment or discovery of HQDA  
22 files.

1           The fact that the government waited until the day before  
2   the defense Article 13 filing to review the 1,374 Quantico e-mails  
3   the government had in its possession between 2 June 2011 and 5  
4   December 2011, is troubling. The government's position that it  
5   waited to review these e-mails because the review was to look only  
6   for *Jencks* and *Giglio* material. The government's position that it  
7   did not review the e-mails for documents material to the preparation  
8   of the defense because the defense discovery request was not specific  
9   enough and documents do not fall within R.C.M. 701(a)(2) is  
10   untenable. The e-mails were not classified. Although the defense  
11   discovery request stated "documents and not" e-mails, e-mails can be  
12   documents for the purposes of R.C.M. 701(a)(2) as well as *Giglio* and  
13   *Jencks* material.

14           The government has an obligation to search for information  
15   under the control of military authorities in their possession for  
16   information discoverable under R.C.M. 701(a)(2). The Court notes,  
17   however, that the defense 8 December 2010, discovery request asked  
18   only for documents and observations by employees of Marine Corps Brig  
19   Quantico relating to the accused. The vast majority of e-mails at  
20   issue are not by employees of Marine Corps Brig Quantico.

21           The Court further finds the government by giving the  
22   defense 84 e-mails the night before the Article 13 filing was due  
23   caused disruption to the Court's schedule, but it did not cause trial

1 delay. The trial was scheduled for 4 to 24 February 2012, after the  
2 July Article 39(a) session. The 30 August 2012, case calendar agreed  
3 to by the parties and the Court maintain that date. This action by  
4 the government in an otherwise diligent prosecution does not violate  
5 Article 10. Even absent an earlier agreement by the parties, this  
6 trial would have inevitably been delayed into 2013, with or without  
7 the motion to compel free litigation in light of the 2 weeks of  
8 Article 39(a) sessions added to the calendar to litigate the Article  
9 13 motion and the required defense M.R.E. 505(h) notices and the time  
10 required to process them.

11 The government advised the Court from the start that it  
12 takes 45 to 60 days to coordinate with agency equity holders to  
13 determine whether to disclose information the Court had deemed  
14 discoverable or to provide for limited disclosure under M.R.E. 505(g)  
15 or invoke a privilege.

16 When the government has needed additional time, the  
17 government has requested file -- has filed for leave of the Court.  
18 Court rulings granting leave of the Court to either party for  
19 additional time or motions for continuances means the Court deemed  
20 them to be reasonable delay.

21 The defense argues that in order to exercise reasonable  
22 diligence under Article 10, the government should have coordinated  
23 with equity holders, agencies and had been prepared M.R.E. 505(g)

1 substitutions or invoke a privilege prior to the Court ruling on  
2 whether the information that is the subject of the litigation is  
3 discoverable. Article 10 does not require this prepositioning. It  
4 is impracticable and would have the government and the equity agency  
5 holders spend potentially vast amounts of time gathering information  
6 and proposing redactions and substitutions to information the Court  
7 ultimately orders is not relevant or discoverable.

8 Balancing the four factors.

9 As with the pretrial referral delay, the reasons for the  
10 delay justify the length of the delay. The test for Article 10 is  
11 not whether the government could have acted with greater speed; it is  
12 whether the government with reasonable diligence. In this case, it  
13 did.

14 The Court has reviewed all classified filings filed by the  
15 parties with respect to this motion. The classified filings are  
16 consistent with the Court's ruling.

17 Ruling.

18 The Court added 6 days to the R.C.M. 707 clock, discounting  
19 properly excluded delay. The accused was arraigned within 120 days  
20 of imposition of restraint. The defense motion to dismiss for lack  
21 of speedy trial under R.C.M. 707 is denied. The government acted  
22 with reasonable diligence throughout the prosecution. The defense

1 motion to dismiss for lack of speedy trial under Sixth Amendment and  
2 Article 10 UCMJ is denied.

3 So ordered this 26th day of February 2013.

4 All right. I note it is 2:40 or 1440. I believe that we  
5 have two issues remaining to be litigated today. Is that correct?

6 TC[MAJ FEIN]: Yes, ma'am.

7 CDC[MR. COOMBS]: Yes, Your Honor.

8 MJ: Okay. Do the parties have a preference which one you'd  
9 like to litigate first?

10 TC[MAJ FEIN]: Ma'am, the United States offers or proposes that  
11 the Article 104 issue should go first. It might be faster.

12 CDC[MR. COOMBS]: That's fine with the defense, Your Honor.

13 MJ: All right. Why don't we do this, let's take a brief  
14 recess. How long would you like?

15 TC[MAJ FEIN]: Fifteen minutes, ma'am.

16 CDC[MR. COOMBS]: That's fine with the defense, ma'am.

17 MJ: All right. Court will reconvene then at 5 minutes to 1500  
18 or 3:00 and we will discuss the Article 104 portion of the M.R.E.  
19 505(i) motion.

20 Court is in recess.

21 [The Article 39(a) session recessed at 1443, 26 February 2013.]

22 [The Article 39(a) session was called to order at 1506, 26 February  
23 2013.]



1 MJ: This Article 39(a) session is called to order. Let the  
2 record reflect that all parties present when the court last recessed  
3 are again present in court.

4 At issue is the -- I suppose at this point it's a defense  
5 motion, even though it originated as a government motion, to preclude  
6 the government from introducing certain evidence. Would you like to  
7 set that forth for the record?

8 CDC[MR. COOMBS]: Yes, Your Honor. The government's initial  
9 filing was Appellate Exhibit 477 and 478. In that filing the  
10 government indicate they intended to call a witness, Mr. Doe, in sent  
11 -- excuse me, in merits along with five other witnesses who  
12 essentially will help establish foundation for the testimony that  
13 they intend to elicit.

14 In our response on Appellate Exhibit 485, we raised the  
15 issue that Mr. Doe and the five other witnesses are not relevant for  
16 merits. The government replied in Appellate Exhibit 488.

17 The defense's position is that Mr. ----

18 MJ: Well, before you get started though, the government is  
19 offering it as relevance on the merits for two of the specifications.  
20 Am I correct on that?

21 CDC[MR. COOMBS]: That is correct, Your Honor.

22 MJ: Okay.

1 CDC[MR. COOMBS]: With regard so -- actually, I'll just talk  
2 about Specification 1 of Charge II for a moment. The Court has  
3 already determined that that punishes the wrongful and wanton  
4 publication of intelligence on the Internet, not giving intelligence  
5 to the enemy. So the defense's position, as articulated in our  
6 motion, the actual receipt by the enemy with regards to that  
7 specification would not be relevant because the offense doesn't deal  
8 with giving intelligence to the enemy. It would not be relevant to  
9 any fact at issue, but more importantly is the Article 104 offense,  
10 which is primarily what the government's position is as to why they  
11 should be able to offer this information.

12 As the Court knows, Article 104 lays out two elements: that  
13 the accused, without proper authority, knowing gave intelligence to  
14 the enemy; and that intelligence information was true or implied the  
15 truth at least in part. Nowhere does it indicate that actual receipt  
16 by the enemy is required. The government relies upon the *Benchbook*  
17 instruction in order to say -- or excuse me, the *Benchbook* definition  
18 of intelligence in order to say that we are required to show actual  
19 receipt. At least in the *Benchbook* it defines intelligence as  
20 meaning any helpful information given to and received by the enemy,  
21 which is true at least in part.

22 Now, the *Benchbook* definition, however, is at odds with the  
23 definition provided by the *Manual for Courts-Martial*. Within the

1 Article 104 offense, Part 4-41, it defines within the *Manual*  
2 intelligence and it says, "Intelligence imports the information  
3 conveyed is true or implies as truth at least in part." The *Manual*  
4 does not require the information to actually be received by the  
5 enemy.

6 In this instance the *Benchbook* definition relied upon the  
7 government as not controlling. In fact, the *Benchbook* itself and its  
8 preface talks about the fact that the *Benchbook* is drafted based upon  
9 the statutes, case law and other principle sources for military  
10 jurisprudence. It's those sources and not the *Benchbook* that should  
11 be cited as legal authority.

12 The Court in its draft instructions indicated that it was  
13 probably -- well, it was leaning towards, in fact, giving the  
14 *Benchbook* definition of intelligence because it's within your draft  
15 instructions. The defense, however, requests that the Court give the  
16 *Manual for Courts-Martial* definition of intelligence.

17 When you look at intell ----

18 MJ: Let me just ask you a question though. Going back to the  
19 early days of the litigation when we were litigating the continuity  
20 of the Article 104 by indirect means, the Court did tell the defense  
21 that the Court would be making instructions to ensure that this  
22 statute was constitutional.

23 CDC[MR. COOMBS]: Yes, Your Honor.

1 MJ: The defense is specifically saying that you do not want me  
2 to instruct that the intelligence has to be received by the enemy?

3 CDC[MR. COOMBS]: Yes, Your Honor. The reason why, I mean,  
4 this actually an interesting *juxtaposition* to our normal positions.  
5 It would normally be the defense arguing for a greater burden and the  
6 government saying, "Look, it's not required." But here even if we  
7 were so inclined to make that argument, it's clear that it's simply  
8 not required to show actual receipt.

9 The *Benchbook* definition of intelligence kind goes array  
10 because intelligence is a noun; it's a thing. It doesn't change  
11 based upon whether or not it's received or read in order to be  
12 intelligence. The *Benchbook* adds a verb to the definition of  
13 intelligence of receipt, in this case received by the enemy. If the  
14 *Benchbook* definition and not the *Manual for Courts-Martial* definition  
15 of intelligence controlled then it would not make sense in the  
16 situation of an attempt, because if somebody was attempting to give  
17 intelligence to the enemy and the definition of intelligence is  
18 information which is true and received by the enemy, then obviously  
19 you can't attempt to give intelligence to the enemy in that  
20 situation. That's why the *Benchbook* probably, because we haven't  
21 done a lot of 104 offenses, added that additional language which is  
22 not required.

1           Next, the government argues that giving the intelligence to  
2 the enemy is a separate and distinct crime from communicating with  
3 the enemy. In this position and with its definition of intelligence  
4 is also at odds with the *Manual for Courts-Martial*. The MCM defines  
5 -- under the MCM giving intelligence to the enemy as a subset of  
6 communicating or corresponding with the enemy. If the Court looks at  
7 Article 104, when it talks about the nature of the offense for giving  
8 intelligence to the enemy it states, "Giving intelligence to the  
9 enemy is a particular case of corresponding with the enemy made more  
10 serious by the fact that the communication contains intelligence that  
11 may be useful to the enemy for any of the many reasons that make  
12 information valuable to belligerence." Key within there is the fact  
13 that it is a particular case of corresponding. When you look down at  
14 communicating with the enemy, communicating with the enemy says no  
15 unauthorized communication correspondence or intercourse with the  
16 enemy is permissible. Then it goes on to talk about the intent,  
17 content and method of the communication, correspondence or  
18 intercourse immaterial, no response or receipt by the enemy is  
19 required. The offense is complete the moment the communication,  
20 correspondence or intercourse issues from the from the accused.

21           In this instance it's clear, even when you look within the  
22 manual that giving intelligence to the enemy is a form of

1 correspondence. Correspondence falls under communicating with the  
2 enemy. Under 104, actual receipt by the enemy is not required.

3 Cited in our motion and instructed for this principle is  
4 the case of *The United States v. Olson*. It's at 20 CMR 461. Within  
5 that case, *Olson*, they citing the *Manual* state, "Correspondence does  
6 not necessarily import a mutual exchange of communication. The law  
7 requires absolute non intercourse and any unauthorized communication,  
8 to matter what may be its tenor or its intent, is here denounced.  
9 The prohibition lies against any method of communication whatsoever.  
10 The offense is complete the moment the communication issues from the  
11 accused."

12 MJ: Isn't *Olson* interpreting a communications -- the  
13 communications subsection of the 104?

14 CDC[MR. COOMBS]: It is, Your Honor, but the defense's  
15 position is that giving intelligence is a subset of communicating  
16 with the enemy.

17 MJ: Then why isn't it a lesser included offense?

18 CDC[MR. COOMBS]: Not from the standpoint of lesser included.  
19 Giving intelligence to the enemy is a form of communicating with the  
20 enemy, just made more serious by the fact that you're actually giving  
21 intelligence as opposed to just communicating it. It's the defense's  
22 position when you look at provision 5 and provision 6, unlike what  
23 the government is arguing that these are separate and distinct

1 crimes, the giving intelligence to the enemy is just simply a form of  
2 communicating with the enemy. As the definition lays out, it's made  
3 more serious by the fact that the communication contains  
4 intelligence. Olson defining this as well as the *Manual* going on to  
5 say that the offense is complete the moment the communication,  
6 correspondence or intercourse issues from the accused is, in the  
7 defense's position, covering both a communicating with the enemy  
8 where it may just be a verbal communication and a giving --  
9 correspondence with the enemy, where you're giving intelligence to  
10 the enemy.

11 In that situation, the defense's position is that none of  
12 the cases cited by the government in their motion or for that matter  
13 the *Winthrop* [sic] *Treatise*, recognizing that it is a respected  
14 treatise, but it is a treatise that predates the *Manual for Courts-*  
15 *Martial*. None of the authorities cited by the government undercuts  
16 the position of the *Manual for Courts-Martial*, which is very clear  
17 that receipt by the enemy is not required.

18 MJ: Then why does the *Manual* provision not specifically address  
19 -- it's falling under the communications piece, isn't?

20 CDC[MR. COOMBS]: It is, Your Honor. Again, when you look at  
21 Part 4-41, it's important that -- actually I think a good way of  
22 looking at this is when you look at 104(2), just within the text of  
23 the statute, the statute lays out without proper authority knowing

1 harbors, protects or gives intelligence or communicates or  
2 corresponds with or holds any intercourse with the enemy either  
3 directly or indirectly. All of that conduct falls under 104(2).  
4 Then when you go over to the explanation, you see for the (c)5, where  
5 it lays out the nature of the offense for giving intelligence to the  
6 enemy, it's clear that by its plain terms that giving intelligence is  
7 a particular case of corresponding with the enemy. When you look at  
8 communicating with the enemy it covers no unauthorized communication,  
9 correspondence or intercourse with the enemy.

10           In this instance they're not separate, distinct offenses.  
11 They may be you have an ability of communicating with the enemy  
12 through communication, correspondence or intercourse. That is part  
13 of the 104(2). If you give intelligence to the enemy through  
14 correspondence, that's just communicating with the enemy, but it's  
15 made more serious that you're giving intelligence.

16           As you go on then it's clear that the offense is complete  
17 the moment that communication, correspondence or intercourse issues  
18 from the accused. The actual receipt by the enemy is not required.

19           MJ: Is the defense aware of any case that has charged attempted  
20 communication with the enemy?

21           CDC[MR. COOMBS]: The *Anderson* case is an attempted  
22 communication with the enemy case.



1 MJ: And how would you -- in light of the definition that you  
2 just described to me, how would you ever have an attempted  
3 communication case?

4 CDC[MR. COOMBS]: The only way you can have an attempting to  
5 communicate with the enemy case is when there is a factual  
6 impossibility of communicating with the enemy and *Anderson* is a prime  
7 example of that. His communication was with an undercover agent, so  
8 it's factually impossible that *Anderson* could communicate with the  
9 enemy in this instance because he gave the information to, in this  
10 case, a CID agent, I believe. That's how you can have an attempted  
11 communicating with the enemy.

12 MJ: Did we have any *Batchelor* and all those old cases. Were  
13 any of those attempted communication cases or were all those actual  
14 communication cases?

15 CDC[MR. COOMBS]: I believe they're all actual, ma'am.  
16 *Anderson* was the one case that stuck out for an attempt when I was  
17 looking. That's how I would think you would have, like I said, an  
18 attempt when you did not factually commit the offense under the set  
19 of circumstances that you have.

20 Importantly, there is no case which would support the  
21 government's position that actual receipt is required, especially if  
22 you take out the *Benchbook* definition.

1           The next argument the government proposes is that under  
2 their logic you cannot have the act of giving intelligence to the  
3 enemy without actual receipt, meaning that if you give something that  
4 implies that the person has received it. The government argues then  
5 it's facially relevant because the receipt tends to prove giving.  
6 Under that same logic, if you applied that logic to communication, I  
7 mean you could make the same argument. You can't really communicate  
8 unless the other person's heard your communication.

9           MJ: Well, now we're at a different issue though, whether it's  
10 required and whether it's relevant are two different questions. It's  
11 not required to potentially be relevant.

12          CDC[MR. COOMBS]: Correct, Your Honor. My argument is it's  
13 not relevant at all. I'm just dealing with the next position that  
14 the government has argued that okay, then it's relevant because it  
15 tends to prove actual, in this instance, the act of giving. The  
16 receipt tends to prove giving. If that were true that it would be  
17 relevant than the same thing would apply to communication. The act  
18 of receiving the information would tend to prove communication. The  
19 *Manual* makes it clear that actual receipt is not relevant.

20          MJ: It doesn't say it's not relevant. It says it's not  
21 required.

22          CDC[MR. COOMBS]: Well, it's not required, right. Then when  
23 it comes to relevant, this falls back on what the government has

1 argued in the past that -- where's the key moment in time that the  
2 Court has to be considered -- has to be considering when determining  
3 whether information is relevant. In this instance it's the state of  
4 the mind of PFC Manning at the time of the communication or the  
5 correspondence.

6           As the government has argued time and time again  
7 successfully, unfortunately for the defense, when it comes to actual  
8 damage is not relevant to PFC Manning's mind -- mental state when he  
9 was determining whether or not the information could cause damage.  
10 The same logic would apply in this instance here. The key period of  
11 time is not on whether or not the enemy actually received the  
12 information; it's what was PFC Manning's actual knowledge at the time  
13 communication departed from him to WikiLeaks. That's where the Court  
14 has to be focused. The actual receipt by the enemy has nothing to do  
15 with PFC Manning's actual knowledge at the time that he gave  
16 information to a third party. This is what the government has time  
17 and time again called after the fact evidence. They've said it's  
18 relevant to a person's intent and state of mind at an earlier time.  
19 After a fact assessment is irrelevant because the facts are examined  
20 as they appeared to the accused at the time of the offense.

21           The same would be true here. The actual receipt by the  
22 enemy is irrelevant unless PFC Manning had some ability to know that

1 the enemy received it, then that would be relevant to perhaps his  
2 actual knowledge at the time.

3 MJ: Wouldn't that be circumstantial evidence that he was  
4 intending to -- or he was knowingly taking this information and  
5 aiding the enemy?

6 CDC[MR. COOMBS]: If there was some ----

7 MJ: Knowingly giving the information to the enemy?

8 CDC[MR. COOMBS]: If there is some connected -- connection  
9 between PFC Manning and the actual receipt by the enemy that you  
10 could actually -- you could show, and then say okay, see that goes --  
11 that's circumstantial evidence of his actual knowledge. Here that's  
12 not the case. I mean, it's very similar to our argument of no damage  
13 here is some circumstantial evidence to support PFC Manning's belief  
14 that the information could not cause damage. The Court said no.  
15 There are too many factors over here that PFC Manning could not have  
16 known.

17 The same thing with the actual receipt by the enemy. The  
18 government is going to attempt through Mr. Doe and through the five  
19 other witnesses to show actual receipt by the enemy. What we don't  
20 know and what we don't have is how the enemy actually got that  
21 information, if in fact they did get that information. Very similar  
22 to no damage, what you don't know is what prophylactic measures did  
23 the government take in order to prevent damage or what steps did they

1 take that PFC Manning could never have known. This situation is the  
2 exact same thing, except now it's the government instead of the  
3 defense asking to use after the fact evidence.

4 It's the defense's position that not only is this not a  
5 required element under 104, but actual receipt by the enemy is not  
6 relevant unless you can tie it to the key moment in time, and that is  
7 the actual knowledge of PFC Manning when he provided the information  
8 to WikiLeaks.

9 MJ: What instructions did the defense request that I give for  
10 this offense?

11 CDC[MR. COOMBS]: This the -- we went into the actual  
12 knowledge and we requested instructions on what it meant to  
13 indirectly provide the information to the enemy.

14 MJ: So the defense has never requested then the instruction on  
15 -- I've got here, third element -- this is in the 22 June 2012. The  
16 only reason I'm going here is because I want to make sure that if the  
17 defense is changing your position, I want to make sure the record is  
18 clear.

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 MJ: I have enemy, the third element that the government must  
21 prove beyond a reasonable doubt is that the entity that received the  
22 information was an enemy, which to me is saying that it has to have  
23 been received.

1 CDC[MR. COOMBS]: That would be a poor choice of words then,  
2 because when you go off of the actual charge giving intelligence to  
3 the enemy you have to prove that that intelligence that you gave --  
4 again, the key moment in time is the moment the communication departs  
5 from you, that you are giving it to the enemy. The actual receipt by  
6 the enemy is not required, but you do have to show that it's going to  
7 the enemy. At the time when the defense was requesting this, we were  
8 under the -- we wanted to make sure that there was an argument that  
9 WikiLeaks was an enemy of the United States.

10 MJ: Just to make sure that I've got the record clear then, the  
11 defense -- the defense does not want the Court to instruct that the  
12 information had to be received by the enemy for the 104 offense?

13 CDC[MR. COOMBS]: That is correct, Your Honor.

14 MJ: And that's based on the communication piece in Article 104  
15 ----

16 CDC[MR. COOMBS]: Article 104(c) ----

17 MJ: ---- 6(a), right? (C)(6)(a)?

18 CDC[MR. COOMBS]: (c)(5)(a) and (c)(6)(a).

19 MJ: All right. And your linkage there is the word  
20 correspondence?

21 CDC[MR. COOMBS]: Yes, Your Honor.

22 MJ: So in this case then, I mean your argument is that giving  
23 intelligence to the enemy -- well to correspond with intelligence is

1 a particular kind of correspondence that's more aggravated because  
2 you're corresponding intelligence as opposed to something else?

3 CDC[MR. COOMBS]: Yes, Your Honor. And it goes with the  
4 entire spirit of 104 of actual -- of prohibiting any communication  
5 with the enemy. If, in fact, under the statute there was an intent  
6 to have a requirement of receipt by the enemy for say giving  
7 intelligence, you would expect to see that within the statute,  
8 because that would be a marked difference departing from the spirit  
9 of the whole overall statute of prohibiting any communication with  
10 the enemy. That is the one thing that is consistent with all the  
11 case regardless of whether or not -- what provision under 104 they're  
12 charging, is the idea that there is absolutely no authority to  
13 communicate with the enemy. In this instance, if in fact the intent  
14 was to say okay, you know what, with regards to giving intelligence  
15 we're going to require receipt, then you would expect to see that  
16 there and it would be something that would be -- without something  
17 more it would be in direct opposition to the idea of prohibiting any  
18 communication with the enemy in the fact that you commit the offense  
19 as soon as the correspondence leaves you. That makes perfect sense  
20 because sometimes if you can show -- the government's going to argue  
21 that maybe it's just an attempt if we couldn't show actual receipt by  
22 the enemy, but that would be the biggest hole of showing actual  
23 receipt by the enemy, when under the statute really what we're

1 pointing to is no communication. We don't want an individual to  
2 communicate with the enemy under any circumstances. As soon as you  
3 do that, you've committed the offense. By the statute, they've  
4 eliminated that added burden of trying to prove actual receipt.

5 MJ: Well, now I'm going back to the constitutional questions  
6 again because -- well, I guess communication with the enemy, if  
7 somebody wants to go interview someone from al-Qaeda, a journalist,  
8 they're potentially violating the statute with the first e-mail, "Are  
9 you available next week."

10 CDC[MR. COOMBS]: Well, there what would protect them is --  
11 well, actually if they're subject to the Code, for one ----

12 MJ: This is an any person offense.

13 CDC[MR. COOMBS]: True. I'm sorry, that is true. But under  
14 the 104 offense here the communicating with the enemy is any  
15 communication, so if ----

16 MJ: Well, those aren't the facts of this case. We don't need  
17 to go there.

18 CDC[MR. COOMBS]: I can imagine a set of circumstances where  
19 you make your argument, but the 104 offense prohibits any  
20 communication.

21 MJ: Is there any case law that you're aware of that links  
22 giving intelligence to the enemy with communicating intelligence to  
23 the enemy that says giving intelligence is a form of correspondence?



1 CDC[MR. COOMBS]: Nothing that I'm aware of, ma'am, but again  
2 the plain reading of the statute and its explanation indicates that  
3 that's what it is.

4 MJ: All right. Thank you.

5 Major Fein?

6 TC[MAJ FEIN]: Ma'am, if it may please the Court, before even  
7 beginning my portion of the argument, to answer the Court's question  
8 that the Court had for the defense just now. *Anderson*?

9 MJ: Uh-huh.

10 TC[MAJ FEIN]: The pinpoint cite, Your Honor, 68 M.J. 378 at 385.

11 MJ: Okay. Hold on just a minute. I had that case in front of  
12 me just a second ago.

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: Let me get it again. Okay.

15 TC[MAJ FEIN]: So ma'am, it's -- well if you have *Westlaw*  
16 printout, it's possibly Page 11, but the pinpoint cite is page 385 of  
17 the reporter.

18 MJ: Unfortunately the reporters don't go by page by page  
19 anymore. Is it under Number 3, multiplicity or is it before that?

20 TC[MAJ FEIN]: It should be under multiplicity at the very end,  
21 ma'am.

22 MJ: Okay.

1 TC[MAJ FEIN]: The last paragraph. The Court -- this is  
2 C.A.A.F. holds in 2010, that the specifications concerning attempts  
3 to give intelligence to the enemy, the additional charge focused on  
4 attempts to communicate. Congress defined aiding the enemy as giving  
5 intelligence to and then (*italicized*) or communicating with the  
6 enemy, see *Dickinson*. Then at the end of that paragraph the Court  
7 further states because each charge requires proof of a fact that the  
8 other does not, the charges are not multiplicitious.

9 As recent as 2010, C.A.A.F. has held that the two are  
10 separate and distinct acts.

11 With that, Your Honor, ----

12 MJ: Well, just a minute here.

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: Okay. So we have attempts to give intelligence to the Army  
15 -- to the enemy and attempts to communicate with the enemy?

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: And we have the fact that they're not in a -- that they're  
18 distinct offenses.

19 TC[MAJ FEIN]: And that's citing *Dickinson*, ma'am, I think from  
20 1956, and *Dickinson* Court specifically holds not attempts, but the  
21 actual main offenses both are separate and distinct. If it may  
22 please the Court, I intend to kind of just -- hopefully provide some  
23 clarity on this, both historic and of modern case law.

1 MJ: All right.

2 TC[MAJ FEIN]: It is imperative prior to us moving forward,  
3 hopefully all parties especially the accused going into an inquiry  
4 understands what the charges are and what those elements are. It is,  
5 of course, odd as the Court pointed out that the prosecution would  
6 rather have the elements drop off to lessen the burden. The issue  
7 here is that if the Court and the parties get this wrong and we --  
8 although it might meet a certain burden of a lesser element, we need  
9 to make sure that this -- at least the United States requests that  
10 the elements are clearly articulated.

11 Part of the problem, of course, is, is it an element or is  
12 it a definitional requirement? The government argues that in essence  
13 it's an element and we'll get to that.

14 The United States would like to make the record clear on  
15 this, Your Honor. The United States charged PFC Manning with aiding  
16 the enemy by giving intelligence. It is one of the many different  
17 forms of aiding the enemy, and under the current UCMJ it's a  
18 violation of Article 104, sub 2. Historically aiding the enemy  
19 consists of many different acts, such as relieving the enemy with  
20 money, supplies, ammunition, harboring or protecting the enemy,  
21 holding correspondence or today communicating with the enemy and  
22 giving intelligence to the enemy. All separate and distinct acts.

1 MJ: Well, what's the government's position then, why do they  
2 use the word "correspondence" in both giving and communicating?

3 TC[MAJ FEIN]: Yes, ma'am. I think that's where we can't escape  
4 history here, Your Honor, of how 104 came about, most of it derived  
5 from *Winthrop* and previous cases like *Dickinson*, *Batchelor* and *Olson*,  
6 but the original offense of aiding the enemy going back to I think  
7 before 1621, had holding correspondence with the enemy and giving  
8 intelligence and then providing aid and comfort. So that term is a  
9 historic term. The current *Manual* defines it as communication and  
10 giving intelligence. Yes, the current *Manual* uses the term  
11 "correspondence," kind of lightly, but it doesn't define the term  
12 correspondence. It defines 104 as communicating or, as C.A.A.F. held  
13 in -- C.A.A.F. stated in *Anderson*, it's communicating or giving  
14 intelligence. But intelligence is historically giving intelligence.  
15 There's always been an act that required receipt, which I intend to  
16 elaborate on.

17 MJ: Okay. Is there any case that actually says that?

18 TC[MAJ FEIN]: Well, ma'am, between *Batchelor*, *Olson*, *Dickinson*  
19 and *Anderson* those cases do hold they're separate and distinct act.  
20 Is there a case that -- the United States has not found a case that  
21 specifically states that receipt by the enemy is a required elemental  
22 -- an elemental requirement of giving intelligence. No.

1 MJ: In all -- if the Court is correct, in all the old cases:  
2 *Dickinson, Olson, Batchelor* it really wasn't an issue. Weren't they  
3 prisoner of war cases? I mean, they were ----

4 TC[MAJ FEIN]: They were communication cases, yes, ma'am. Well,  
5 *Anderson* an attempt. But yes, the older cases are prisoner of war  
6 cases. They are not appropriate here. There are historic cases from  
7 the civil war, Your Honor, of for instance a -- I can provide the  
8 pinpoint cite as well, but -- of a Soldier being prosecuted under  
9 court-martial for providing information about troop locations, troop  
10 strengths, that was published by a newspaper and he was convicted at  
11 a court-martial for giving intelligence.

12 MJ: Do you have the actual case?

13 TC[MAJ FEIN]: Yes -- well, we have what remains from the  
14 Library of Congress, Your Honor.

15 MJ: The Court would appreciate a copy of what remained from the  
16 Library of Congress.

17 TC[MAJ FEIN]: You will have a copy after today's session, Your  
18 Honor, and so will the defense.

19 MJ: Thank you.

20 TC[MAJ FEIN]: Your Honor, General Orders Number 10,  
21 Headquarters, Department of Washington, 1863, and we'll provide a  
22 copy of that case to the parties.

1           Ma'am, for holding correspondence or today communicating  
2 with and giving intelligence to the enemy, they both may occur  
3 whether through indirect or direct means, historically under today's  
4 Code. These criminal offenses for Soldiers date back, as I mentioned  
5 before, all the way to 1621, when they first appeared in the American  
6 Articles of War in 1775, Article 27 and 28. After the Civil War they  
7 were codified in Articles 45 and 46 of the American Articles of War,  
8 1874, the ultimate pre cursor to the current Code. The focus of  
9 *Winthrop* the learned treatise on pretty much all aspects of military  
10 justice that have essentially been litigated today and even the ones  
11 that have been.

12           Modern day Courts have relied on *Winthrop's* interpretation  
13 of these historic offenses in order to illuminate how to process  
14 these charges. The *Olson* court especially, the CMR, laid out the  
15 entire history of 104 in their ruling.

16           Presently, Your Honor, the parties may seem to confuse the  
17 difference between communicating and giving intelligence because both  
18 acts do constitute aiding the enemy, but so do the act of harboring  
19 the enemy or giving ammunition. Giving ammunition, given the plain  
20 language of that, they have to receive ammunition. Giving  
21 intelligence, there's a definitional requirement there, which makes  
22 sense why the -- I'll get to that in a moment, Your Honor.

1 MJ: All right. Before you do that, the provisions of *Winthrop*  
2 that you're citing, do you actually have them that you can give a  
3 copy to the Court?

4 TC[MAJ FEIN]: Yes, ma'am. I have some pinpoint cites right  
5 here and we'll print the relevant portions of *Winthrop's* ----

6 MJ: Thank you.

7 TC[MAJ FEIN]: So, ma'am, *Winthrop* specifically outlines a  
8 historic precursory to Article 104 of the UCMJ first for holding  
9 correspondence, or today again communication, under the Articles or  
10 War was interpreted "in its usual and familiar sense," as a letter of  
11 communication with the enemy. The crime is completed once the  
12 communication is committed to the messenger, whether or not it was  
13 actually delivered. That's going to be *Winthrop* at 633.

14 Proving, holding correspondence or communicating with the  
15 enemy falls in the modern day mailbox rule. Once it's released out  
16 of your custody, the crime has been completed. That is memorialized  
17 in today's *Manual for Court-Martial*. That is not what Private First  
18 Class Manning is charged with. He is charged with giving  
19 intelligence to the enemy. *Winthrop* describes the crime of giving  
20 intelligence to the enemy as communicating directly or indirectly  
21 with the enemy by providing information "in regard to the number,  
22 condition, position or movement of the troops, amount of supplies,  
23 acts or projects of the government in connection with the conduct of

1 war or any other fact or matter that may instruct or assist the enemy  
2 in the prosecution of hostilities. That's at 634.

3 Your Honor, documenting the number, condition, position and  
4 movements of the troops, that is the exact and precisely the type of  
5 information that is found in the CIDNE databases the government  
6 intends to use. The defense is arguing relevance and why this is  
7 relevant for this court-martial and for Department of State cables.

8 *Winthrop* further states, "It is necessary that the enemy  
9 shall have been actually informed." This is for giving intelligence  
10 to the enemy. On Page 634 *Winthrop* actually italicizes, Your Honor,  
11 the term "actually inform," to highlight that for all military  
12 justice practitioners at the time.

13 He further states, "If therefore the intelligence fails to  
14 reach him, the enemy, this offense is not completed, though the  
15 offense of holding correspondence may be depending on the facts and  
16 circumstances."

17 Your Honor, Articles 45 and 46 were combined. Under the  
18 modern UCMJ Article 46 became Article 104 sub 2, Article 45 became  
19 Article 104 sub 1.

20 MJ: And where do I have all that legislative history?

21 TC[MAJ FEIN]: You'll have that as well at the end of today,  
22 Your Honor.

23 MJ: Thank you.



1 TC[MAJ FEIN]: Your Honor, the MCM provides that giving  
2 intelligence only has two elements, as the Court has already implied  
3 and it's also list -- the elements are listed in the draft -- the  
4 draft instructions. Furthermore, the MCM does, as you've already  
5 discussed somewhat with the defense, under the explanations section  
6 of 104, states that the nature of the offense of giving intelligence  
7 to the enemy is a particular case of corresponding with the enemy,  
8 but made more serious by the fact the information contains  
9 intelligence and at the very end of that section, that the  
10 intelligence may be conveyed by direct or indirect means. So giving  
11 is the act of conveying.

12 Again, we're going to get to -- the United States we'll  
13 focus on the actual words of the specs. Giving is the act of  
14 conveying. According to *Black's Law Dictionary* 2009, the 9th  
15 edition, conveying is defined as "To transfer or deliver something  
16 such as a right or property to another." Actual delivery is a  
17 conveyance, it's giving.

18 The MCM further delineates that "no response or receipt by  
19 the enemy is required," as the defense has argued, but that  
20 specifically, expressly falls under the communication with the enemy.  
21 That line does not fall under, within the current MCM, giving  
22 intelligence to the enemy.

1           Your Honor, contrary to the defense's argument, even the  
2 Military Judge's *Benchbook* as described implies this required element  
3 as a definitional requirement. Unfortunately, the United States  
4 couldn't find any history on how that *Benchbook* definition arrived,  
5 but I think this argument shows why it was put there, and not an  
6 element because the MCM doesn't have it as an element listed;  
7 therefore, the *Benchbook* would not be consistent.

8           The standard instruction does state, however, intelligence  
9 -- from the *Benchbook* intelligence means any helpful information  
10 given to and received by the enemy, which is true at least in part.  
11 It is clear that the drafters of the *Benchbook* recognized this  
12 requirement and placed it in the definitions rather than creating  
13 that additional element.

14         MJ: Well, wait a minute. Is actual receipt by the enemy, is  
15 that a definition or an element?

16         TC[MAJ FEIN]: Well, Your Honor, the only reason -- the United  
17 States would argue in practice or -- in practice it is an element  
18 because if the government doesn't prove the receipt, it didn't meet  
19 the requirements to meet the definition of intelligence. The only  
20 reason ----

21         MJ: Now, I'm getting confused.

22         TC[MAJ FEIN]: Yes, ma'am.

1 MJ: I'm going back to what the defense was arguing to me that  
2 intelligence is a noun.

3 TC[MAJ FEIN]: Yes, ma'am. Ultimately the United States argues  
4 it is an element. It's a requirement. Receipt by the enemy is  
5 required for giving intelligence. It's just the *Manual for Courts-*  
6 *Martial* does not outline it as an element. It only outlines two  
7 elements, this is not one of them. The *Benchbook* doesn't ----

8 MJ: The element is to give.

9 TC[MAJ FEIN]: Say again, ma'am?

10 MJ: The element would be to give.

11 TC[MAJ FEIN]: Yes, ma'am. To give and the definition of to  
12 give to be convey, to convey to another, which means they have to  
13 receive it.

14 MJ: Okay.

15 TC[MAJ FEIN]: Maybe a better way to state this, Your Honor,  
16 from the United States perspective is an additional instruction or  
17 the current instruction of intelligence should be bifurcated into  
18 intelligence, information that it could be helpful to the enemy, true  
19 -- at least true in part, and a second one saying giving is -- or to  
20 give is to convey to another which requires receipt. For some reason  
21 the *Benchbook* does combine that into a definitional requirement.

22 Additionally, Your Honor, the MCM doesn't actually give a  
23 definition of intelligence. It gives a nature of intelligence and it

1 uses that word convey at the very end as stated before. Your Honor,  
2 based off your own instructions, Appellate Exhibit 410, Draft  
3 Instructions, this requirement of receipt is there, but of course  
4 it's under the instruction not as an element.

5 Your Honor, finally based off the cases the defense cites,  
6 no Court, at least that the prosecution could find, has ever applied  
7 the elemental requirement of aiding the enemy by communication or  
8 holding correspondence under the old Articles of War, to giving  
9 intelligence, separate and distinct, as already referenced -- the  
10 Anderson court held. Therefore, Your Honor, the United States argues  
11 that it's required to prove that intelligence was in the hands of the  
12 enemies of the United States in order to prove aiding the enemy by  
13 giving intelligence, either as a separate element or as a  
14 definitional requirement of the word give.

15 MJ: Let me ask you another thing. Assume I rule for the  
16 defense and I say, "Okay, receipt by the enemy is not a requirement  
17 of Article 104." Would the information that you seek to introduce be  
18 relevant anyway?

19 TC[MAJ FEIN]: Yes, Your Honor. Multiple ways. First, Your  
20 Honor, as far as -- if the Court was to rule that it's not required  
21 as aiding the enemy, it can be -- as an element of aiding the enemy,  
22 it can still be used to show -- actually just take exactly what the  
23 defense argued before. The harm argument that occurred before the

1 Court was that actual harm -- present day actual harm or lack  
2 thereof, is not relevant to any elements of the offense that PFC  
3 Manning is charged with. That was the actual Court's ruling. It  
4 wasn't that post criminal misconduct acts couldn't be used to prove  
5 elements of a crime, it's just that it had to be an element of the  
6 crime. The element of the crimes when we litigated actual harm or  
7 damage, that motion in *limine*, was that the information could cause  
8 harm, not that it did. That was what we litigated. The defense's  
9 position in that case, which the prosecution actually adopts for this  
10 argument, is that for intent to commit grievous bodily harm, there's  
11 an element or a requirement that that actually be proven; therefore,  
12 any type of activity could -- any type of activity after the  
13 commission of the crime could be used, could be potentially relevant  
14 to the circumstantial evidence of that actual crime. In this case,  
15 Your Honor, the knowingly giving intelligence to help inform the  
16 trier of fact of the knowing aspect of it and giving the  
17 intelligence, the fact that the enemy received it is circumstantial  
18 evidence of the knowing, giving portion.

19 MJ: I understand the argument the government is making by  
20 relating this case to the aggravated assault. Relying on *United*  
21 *States v. Bean* which is aggravated assault with a firearm, there was  
22 no harm at all, how does that case get to the result ----

1 TC[MAJ FEIN]: Unfortunately it's not a good case, Your Honor.  
2 The case that we cited is not a good case. I'll have to go back and  
3 actually pull the cases from the actual harm damage argument and to  
4 be honest, it would be the cases the defense cited in that. Again,  
5 it's the -- if you have an intent -- you can use the medical reports  
6 from a doctor to show that you had the intent grievous bodily harm  
7 because that was an element. We'll provide that as well.

8 MJ: Okay. That would be helpful. I don't see *Bean* as relevant  
9 at all.

10 TC[MAJ FEIN]: Yes, ma'am. And that same argument, ma'am,  
11 would apply to Spec 1 of Charge II as well, the causing intelligence  
12 to be published -- to be published to the Internet accessible by the  
13 enemy, by showing that it was published on the Internet and accessed  
14 by the enemy, would show the causing of it to occur.

15 MJ: See now I'm having a little more trouble with this one.  
16 What's the difference between using the receipt by the enemy for  
17 Specification 1 of Charge II with the defense trying to show actual  
18 damage to prove the accused's state of mind for a reason to believe?

19 TC[MAJ FEIN]: No, ma'am. The government's argument is that it  
20 be used for the actual act, not the state of mind. It's causing  
21 intelligence. To prove that the accused caused intelligence to be  
22 published, if it was actually published, that helps inform the trier

1 of fact that he caused it to be published. That's the government's  
2 argument.

3 MJ: Well, I understand that, but it's the receipt by the enemy  
4 piece.

5 TC[MAJ FEIN]: Yes, ma'am. The enemy has received it ----

6 MJ: How is that relevant? He's charged with wantonly  
7 publishing ----

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: ---- information with, I believe the specification says  
10 with knowledge that the -- let me state this correctly, wantonly --  
11 wrongfully and wantonly causing publication of intelligence belonging  
12 to the United States on the Internet, knowing the intelligence is  
13 accessible to the enemy. Then how does the fact that the enemy  
14 ultimately received the intelligence -- again, we're going back to  
15 the accused's state of mind at the time ----

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: ---- he caused the publication. That seems to me the same  
18 argument that the defense made for the reason to believe.

19 TC[MAJ FEIN]: Yes, ma'am. For the -- for the *mens rea* aspect,  
20 the United States agrees for that specification for *mens rea*, yes.

21 MJ: So how else will it be relevant to that specification?

22 TC[MAJ FEIN]: Ma'am, the United States argues that it would  
23 relevant to show that it was actually caused to be published to the

1 Internet. There are many avenues of different types of evidence that  
2 could be used to show that it was on the Internet. Not all the  
3 information, for instance, could be easily -- sorry, Your Honor. Not  
4 all of the information that was compromised, or at least that's been  
5 charged that was comprised by PFC Manning, was necessarily in one  
6 location and it was accessible, but it was evidence -- the United  
7 States intends to show that the information was caused to be  
8 published on the Internet and by doing that anyone who accessed it  
9 would help inform the trier of fact that it was on the Internet. If  
10 the United States cannot prove that it was actually on the Internet,  
11 then that would be a -- we would not meet our burden, Your Honor, in  
12 order to show it was caused to be published on the Internet.

13 MJ: Now, aren't we triggering over for that specification to an  
14 M.R.E. 403 analysis, because that's not the only way the government  
15 can prove that that information was on the Internet?

16 TC[MAJ FEIN]: That is not possibly the only way, ma'am,  
17 depending on which specification it is, that's correct.

18 MJ: I'm talking about Specification 1 of Charge II.

19 TC[MAJ FEIN]: I'm sorry, ma'am. When I said "specification" I  
20 meant which type of information that was compromised. Some  
21 information there's -- there's many avenues the government could  
22 chose on where to use -- what evidence to use and tailors its case  
23 going forward, the trial plan. Other types of classified information



1 that were compromised in the rest of the specifications aren't  
2 necessarily -- are not so robust with the different type of evidence.  
3 Some have very clean forensic trails; others don't. Others rely more  
4 on circumstantial evidence; others have direct evidence. It would  
5 depend, Your Honor, on ----

6 MJ: Well, if the enemy can pull it down from the Internet,  
7 can't everybody else?

8 TC[MAJ FEIN]: Someone else could, yes, ma'am.

9 MJ: Okay.

10 TC[MAJ FEIN]: So Your Honor, again going back to the main  
11 argument that the United States has is that receipt is required under  
12 Article 104 at a minimum.

13 Your Honor, assuming the Court finds that it is a  
14 requirement for the government to prove aiding the enemy by giving  
15 intelligence, that receipt is required. The defense further argues  
16 that under M.R.E. 403, first it's not relevant. It's not an element,  
17 even though it is an element -- if it's not an element, therefore  
18 it's not relevant. If it is relevant under 403, it wouldn't be  
19 relevant -- or it wouldn't be admissible for multiple reasons and  
20 should be precluded. The defense has known since November 2001  
21 [sic], and the Court's aware from multiple filings that -- especially  
22 as recent as the 505(i) filing of the type of information that the  
23 United States intends to use to prove that the enemy was in receipt

1 of this information to prove Article 104 and the Article 134, Spec 1  
2 offense.

3 MJ: Neither side has brought this up, but I'm just looking --  
4 well, never mind. The elements that you're looking for in  
5 Specification 1 of Charge II and the element that you -- the elements  
6 that you believe this is -- this information is relevant to prove are  
7 what?

8 TC[MAJ FEIN]: I'm sorry. Say again, Your Honor?

9 MJ: The evidence that you intend to introduce about receipt of  
10 the information or the intelligence for this specification by the  
11 enemy, what is the -- what elements are -- is the government  
12 introducing as evidence to prove?

13 TC[MAJ FEIN]: Ma'am, for the spec ----

14 MJ: The Specification of Charge II?

15 TC[MAJ FEIN]: Which of the elements?

16 MJ: Yes.

17 TC[MAJ FEIN]: Yes, ma'am. Can I have a moment, Your Honor?

18 MJ: Yes.

19 [Pause.]

20 TC[MAJ FEIN]: Well, ma'am, I'm now looking at it to refresh my  
21 own recollection, there's only two elements, so it would be element  
22 one that at or near COB Hammer, Iraq, between 1 November 2009 and on  
23 or about 27 May 2010, that the accused wrongfully and wantonly caused

1 to be published on the Internet intelligence belonging to the United  
2 States Government.

3 MJ: Again, this is where again I'm having a little trouble with  
4 this.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: The relevant part is having knowledge that the intelligence  
7 published on the Internet is accessible to the enemy, that's having  
8 knowledge at the time of the publication.

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: How is subsequent receipt by the ----

11 TC[MAJ FEIN]: Ma'am, the United States isn't arguing that  
12 subsequent receipt is relevant to prove that. It has to be the  
13 accused's knowledge at the time. I mean, the United States intends,  
14 as the defense is aware and it's been mentioned during motions  
15 hearings, the United States intends to provide an ample amount of  
16 evidence that PFC Manning as an intel analyst knew at the time of the  
17 commission of the crime that any intelligence type of information,  
18 any of the troop, strength, movement, locations all of that type of  
19 information -- *Winthrop* talked about and that was in CIDNE database  
20 and the Department of State information, once put on the Internet  
21 would be in the hands of the enemy. I mean, he was specifically  
22 trained. The United States intends to put an ample amount of  
23 evidence on that, from AIT training to unit members that are going to

1 testify about that, the actual slides that were used during AIT, even  
2 a slideshow PFC Manning put together about it.

3 MJ: I understand that, but again, how does that subsequent  
4 receipt by the enemy, how is that relevant to what the accused knew  
5 at the time?

6 TC[MAJ FEIN]: Your Honor, the United States -- it's not  
7 relevant to what he knew at the time.

8 MJ: Then what is it relevant to with respect to element one?

9 TC[MAJ FEIN]: Causing the information to be published, Your  
10 Honor.

11 MJ: Walk me through that again how we get there.

12 TC[MAJ FEIN]: To show that it was -- the information was on --  
13 caused to be published on the Internet, that it was on the Internet.  
14 To show that it was on the Internet, the United States intends to  
15 elicit testimony that this information was requested by Osama Bin  
16 Laden, a member of al-Qaeda went to the Internet, got the information  
17 and gave it to him and it was found with Osama Bin Laden. That  
18 information, Your Honor, is relevant evidence to show that it had  
19 been caused to be published.

20 MJ: Well, I guess I'm back to my 403 analysis then. The  
21 government has evidence that Osama Bin Laden pulled it down from the  
22 Internet and that Jon Doe pulled it down from the Internet, wouldn't  
23 the John Doe pulling it down be less prejudicial to the defense?

1 TC[MAJ FEIN]: Possibly, Your Honor. I only say that because  
2 the United States doesn't have a John Doe to put there. I mean,  
3 there's no question that a CID agent -- I mean, there is at least a  
4 CID agent that the United States intends to call that says that they  
5 went on to WikiLeaks for instance for some of the information, were  
6 able to pull it, collect it and authenticate that it was published  
7 that way. Yes, there's at least one other witness in the current --  
8 on the current witness list that will testify to that. Yes, Your  
9 Honor. But that doesn't mean that it's prejudicial, Your Honor,  
10 under M.R.E. 403.

11 One other witness that went on the Internet as part of  
12 their official capacity -- I mean, part of the problem is, Your  
13 Honor, is when this first happened, when WikiLeaks started publishing  
14 all DoD officials were told you can't access WikiLeaks. It's still  
15 true today. CID through special exceptions of being law enforcement  
16 organization, yes, select individuals using special systems did that.  
17 We're calling them as witnesses. Again, I think one individual who  
18 collected the information, printed it, initialed it so we can  
19 authenticate it -- properly authenticate the information and admit it  
20 into evidence. Again, it doesn't mean it's prejudicial under M.R.E.  
21 403.

22 Of course, that's only for Spec 1 of Charge II. That isn't  
23 necessarily -- I mean, the main point of the government's argument

1 here is that it is required under the charged -- the Spec to Charge  
2 I.

3 MJ: All right. I'm going a little bit beyond into the other  
4 motion now, but it appears ripe at this point. The government  
5 advised the Court that you're very concerned about the accused  
6 entering pleas having full knowledge of the elements, the  
7 Specification of Charge I and Specification 1 of Charge II. The  
8 accused isn't pleading to those, so how -- explain to me how that  
9 matters.

10 TC[MAJ FEIN]: Yes, ma'am. If it may please the Court just very  
11 briefly and I think it could be explained better later during that  
12 motion -- that motions portion, but ultimately, Your Honor, it's a  
13 collateral issue that will come up in sentencing if the accused is  
14 found guilty of violating Article 104. By the accused pleading  
15 guilty during the providency -- pleading guilty, going through a  
16 providency inquiry, making admissions for the providency inquiry, not  
17 understanding at the time that this allocution occurs that one of the  
18 effects is anything you say can also be used if you're found guilty  
19 as a sentencing factor. Everything is related when it comes to  
20 sentencing, Your Honor, and the information can be used. If the  
21 accused is, for instance, getting legal advice that this is not an  
22 element, don't worry about it, and it ends up being an element, that  
23 is very -- a very -- there's a high likelihood that's a potential

1 appellate issue. The prosecution's intent is to make sure that every  
2 -- all parties are on a common playing field so there is not -- there  
3 is no mistake of understanding moving forward even all the way  
4 through a contested portion of the trial.

5 MJ: Okay. Thank you. And you'll be providing me all that  
6 information that you said you would.

7 TC[MAJ FEIN]: There's some more, ma'am, just based off the  
8 defense's motion.

9 MJ: All right. Go ahead.

10 TC[MAJ FEIN]: Ma'am, the defense also argues that if it is  
11 under M.R.E. 403, assuming it is a required element, it is also --  
12 they don't say cumulative, but it is -- it would cause an unnecessary  
13 delay. There were six other witnesses, but these are chain of  
14 custody witnesses. The United States would be very happy to enter a  
15 stipulation of the authenticity and the admissibility of this  
16 evidence. The United States isn't adding any additional witness.  
17 Later for an M.R.E. 505(i) motion, the United States intends to call  
18 Jon Doe, the DoD operator who actually collected the evidence from  
19 Abbottabad and then he will testify simply about giving that to an  
20 FBI agent in Afghanistan, that FBI agent going to Quantico and giving  
21 it to a forensic and evidence collection team, and then it passing  
22 through to get to a forensic examiner. All of those witnesses are  
23 critical links in that chain of custody for the four files that the

1 United States intends to use as evidence to show the possession --  
2 the receipt, excuse me.

3           There is no cumulative issue here. It's not unnecessary  
4 delay because they're required. The government, again, would love to  
5 take the position that it's not required, but the Rule require that,  
6 and there's even more, just to be fair. The United States also  
7 intends to call three more witnesses on top of those six in order to  
8 even say what those documents were. After the forensic examiner, it  
9 was given to a CID forensic examiner who compared what was found with  
10 Osama Bin Laden and what was found on WikiLeaks and what was found on  
11 Manning's SD Card at his aunt's house, and will say that they are  
12 essentially same, as a forensic examiner. Then you have a translator  
13 who's going to be called, and is on the witness list, to say what the  
14 letters to and from Osama Bin Laden said. All that information, Your  
15 Honor, is not cumulative, isn't prejudicial because it has to be --  
16 we have to show, we have to prove the information was in the hands of  
17 the enemy.

18           MJ: If it's an element and you have to prove it, you really  
19 don't get to the 403 analysis. Assume I find it's not element and I  
20 go with the communication route here and say that the -- once this  
21 transmissions been made, it's complete, it doesn't require a receipt  
22 by the enemy. The government's second argument to me was it's  
23 relevant anyway?



1 TC[MAJ FEIN]: Yes, ma'am.

2 MJ: But the 403 analysis then would come forward. So assume  
3 you're calling all of these witnesses. What is the estimated length  
4 of time that this is going to take?

5 TC[MAJ FEIN]: Well, ma'am, every witness I just listed has such  
6 a very limited role. They are chain of custody witnesses who either  
7 signed a chain of custody -- every member -- every individual I just  
8 listed from the FBI signed a chain of custody form. It's literally I  
9 had three pieces of digital media and I handed it to this individual.  
10 That is five of the witnesses, starting with an FBI agent in  
11 Afghanistan, the DoD operator. The subject of the 505(i) motion that  
12 will be a little bit more lengthy, but not based off the government.  
13 We just assume there will be a cross-examination, because the  
14 individual, Jon Doe, will have to talk about how he went into a room,  
15 how he picked up the three pieces of digital media and what he did  
16 with them. Assuming an extensive cross-examination, maybe 30 minutes  
17 total of testimony. Granted there are other procedures for that one  
18 individual to be litigated later, so that would save one exception.  
19 The rest, Your Honor, standard law enforcement agents or forensic  
20 examiners, chain of custody, don't expect more than 10 minutes of  
21 actual testimony by each individual. The CID agent -- excuse me,  
22 examiner who reviewed the three types of evidence, will probably have  
23 the most lengthy testimony at about 20 minutes to simply say I

1 compared hash values, I compared file names, file numbers and this is  
2 my conclusion, they essentially the same. That's the extent of his  
3 testimony on this topic. He's also a forensic examiner for many  
4 other pieces of evidence in this case.

5           The translator, there aren't that many lines that the Court  
6 has approved under a separate 505(g)(2) motion to say this is what --  
7 what it said. This is, of course, assuming the defense contests all  
8 of it, which the government is operating under they will. Assuming  
9 that, that's the extent of it, Your Honor. It could very possibly,  
10 other than the DoD operator, could easily be done in less than one  
11 day of court here, depending on cross-examination.

12           MJ: All right. Thank you.

13           TC[MAJ FEIN]: Yes, ma'am.

14           CDC[MR. COOMBS]: Ma'am, with regards to just the last  
15 question on the 403, Mr. Doe is one of those, I guess now nine  
16 witnesses that the government would be calling. In that, as the  
17 Court knows, they're asking for an offsite location for that witness  
18 to testify. It will involve the parties move to some location for  
19 that testimony. As the defense sees it, if this is an element of  
20 104, then obviously the government has to prove it and the  
21 information -- it's an element and it's a burden they need to prove.  
22 Our position obviously is it's not.

1           If the Court agrees with that, then it becomes, well, is it  
2 relevant for -- to prove an element? Is it circumstantial evidence  
3 that would go towards something? From the defense's understanding of  
4 the government's argument, caused to be published is why it's  
5 relevant for Spec 1 of Charge II. There of course, caused to be  
6 published just means even on the Court's definition, what's the  
7 proximate cause of the publication of the information? The defense  
8 doesn't see how actual receipt by the enemy would be relevant to  
9 caused to be published. Certainly, as the government has even said,  
10 they have other information to show that the information was  
11 published on the Internet, to include probably the ability to look at  
12 it now on the Internet.

13           The other offense, the Article 104 offense, it appears that  
14 they would be arguing that it's relevant to prove he knowingly gave  
15 intelligence to the enemy. The idea, again going back to their  
16 motion, that actual receipt is some evidence of giving. The key  
17 thing here is, and what the government is required to prove, is that  
18 he had actual knowledge at the time that he gave it to the third  
19 party, in this case WikiLeaks, that he was giving intelligence to the  
20 enemy. The relevant inquiry is at the time of the offense of giving  
21 it to WikiLeaks. What was his knowledge at that point? Actual  
22 receipt by the enemy would not be relevant to that.

1           The other information that the government has argued that  
2 they would offering perhaps is training or perhaps the PowerPoint  
3 presentation he had to give or some other information he might have  
4 looked at prior to giving the information to WikiLeaks, that would be  
5 relevant and that would be some circumstantial evidence. Actual  
6 receipt by the enemy does nothing in this instance. In fact, even  
7 under the government's own evidence it appears that the receipt by  
8 the enemy was based upon -- if it was in fact received by the enemy,  
9 was based upon the enemy saying, "Hey, we think this on WikiLeaks.  
10 Go take a look at it. Get me the information." They're going to  
11 offer a whole bunch of witnesses to decipher statements to show that.  
12 That has no bearing on the actual knowledge of PFC Manning at the  
13 time that he gave the information to WikiLeaks, unless there's some  
14 connection to that. That would be the training, I guess. The actual  
15 receipt by the enemy doesn't carry the day on that so it's not  
16 relevant. If there is even some remote way of arguing the relevance,  
17 that's where the 403 analysis comes into play. The government  
18 certainly has other information to try to make their argument of  
19 actual knowledge. When we look at nine witnesses now offering  
20 information on this and the Court leaving from here to take the  
21 testimony of one of them, if the Court approves of the government's  
22 request, that's where you would have an undue delay. We would say

1 403 then, if it's remotely relevant, would result in the Court saying  
2 the information should not be introduced during the merits.

3 Now, all this information could be and certainly probably  
4 is if the government can prove it, relevant in sentencing. That's  
5 where the government could bring this information in if they want to  
6 show this as an aggravating circumstance, that, you know what, the  
7 enemy actually did receive the information. That would be an  
8 aggravating factor, if they could show that, and that would be  
9 permissible. But on the merits, it would not be.

10 MJ: Thank you.

11 Government, while you're collecting all of these things for  
12 me can I also get a copy of the actual declassified information  
13 that's at issue?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: I think I have one already, but I'm not sure where it is.

16 Is there anything else we need to address before -- well,  
17 with respect to this motion?

18 TC[MAJ FEIN]: Ma'am, may I have a moment?

19 MJ: Uh-huh.

20 [Pause.]

21 TC[MAJ FEIN]: Nothing further, Your Honor.

22 MJ: Anything from the defense?

23 CDC[MR. COOMBS]: No, Your Honor.

1 MJ: Would the parties like a brief recess before we go into  
2 what I believe is our last motion of the day?

3 CDC[MR. COOMBS]: I'm fine, Your Honor.

4 ATC[CPT MORROW]: We can proceed, Your Honor.

5 MJ: Okay.

6 ATC[CPT MORROW]: Your Honor, the government's brief is at  
7 Appellate Exhibit 496. The defense response is 497.

8 MJ: Okay.

9 ATC[CPT MORROW]: This, of course, deals with Defense Exhibit  
10 Alpha.

11 MJ: Okay.

12 ATC[CPT MORROW]: Your Honor, the government requests the Court  
13 preclude the defense from offering the prepared statement of the  
14 accused during the providency inquiry. Any statement offered by the  
15 accused should be tailored to the facts and circumstances underlining  
16 the elements of the offenses. In other words, comprised of relevant  
17 information.

18 Secondly, Your Honor, the government requests the Court  
19 instruct the accused that the documents clause 18 United States Code  
20 793(e), does not require the government to prove the accused had  
21 reason to believe information relating to national defense could be  
22 used to the injury of the United States or to the advantage of a  
23 foreign nature.

1 MJ: Let me stop you here on a couple of things.

2 ATC[CPT MORROW]: Yes, Your Honor.

3 MJ: The defense statement that is signed ----

4 ATC[CPT MORROW]: Yes, Your Honor.

5 MJ: Normally in, as we call it a military parlance, a naked  
6 plea, frequently the defense will give the military judge basically  
7 the facts, like a proffer, not a signed statement, a proffer, for the  
8 Court and PFC Manning, in this case, to basically educate the judge  
9 as to what the plea is going to be about.

10 ATC[CPT MORROW]: Right.

11 MJ: Now, assuming that this is not a signed statement, does the  
12 government have the same objections? If the Court basically  
13 considers this statement for purposes of the merits ----

14 ATC[CPT MORROW]: Is it consider ----

15 MJ: ---- well, for purposes of the merits as just educating me?

16 ATC[CPT MORROW]: Is it evidence, Your Honor?

17 MJ: No. It would be an Appellate Exhibit.

18 ATC[CPT MORROW]: Assuming the Court would instruct the  
19 accused that it wouldn't be considered for sentencing purposes or any  
20 other purpose other than to educate the Court in crafting questions  
21 that establish a factual basis for the plea, then, no, the government  
22 wouldn't have an objection.

1 MJ: Well, let me just put out on the record where I'm looking  
2 at going with this.

3 ATC[CPT MORROW]: Right.

4 MJ: Is the -- normally in these cases I would have a proffer.  
5 It would be marked as an Appellate Exhibit, not a Defense Exhibit for  
6 purposes of the merits. PFC Manning would have a copy of it in front  
7 of him. I would have a copy of it in front of me. It would help  
8 shape our dialogue as we go back and forth. PFC Manning would answer  
9 my questions. We would establish the elements of the offense and the  
10 providence, what's necessarily relevant evidence for the merits of  
11 the case. The providence inquiry sometimes goes a little beyond  
12 that. For example, the standard AWOL case. Maybe it's not relevant  
13 that you went AWOL to see your sick mother, but it usually comes out  
14 in the providence.

15 ATC[CPT MORROW]: Sure, but sometimes in those cases, there might  
16 be -- you have to explore maybe the duress defense or some other  
17 reason for the person not coming back at a certain time. There may  
18 be some other circumstances in which case you may have to explore the  
19 why of something rather than ----

20 MJ: But I wouldn't normally stop an accused who was talking  
21 about why he was doing certain things in a providence inquiry and  
22 say, "No. No. Stop. That's not relevant to the merits."



1           ATC[CPT MORROW]:     No, and the government understands that,  
2   Your Honor. That's why it's sort of irregular, but maybe a good  
3   place to start is, I mean, if you go into the statement and you look  
4   at Page 24 of the statement.

5           MJ:   Page 24?

6           ATC[CPT MORROW]:     Sorry. I've got to find it myself, Your  
7   Honor.

8                        So Page 24, it's Paragraph 9, at the top of the page, Your  
9   Honor. The paragraph is entitled "Facts Regarding the Unauthorized  
10   Storage and Disclosure of Documents Relating to Detainments by the  
11   Iraqi Federal Police, the Detainee Assessment Brief and the USASIC  
12   Report."

13                   This is -- and so, I'm talking about Page 24 and 25 in  
14   particular. It's two pages of the accused explaining, essentially  
15   uncharged misconduct. In that sense, that really gets to the heart  
16   of the relevance of some of the information within the statement.  
17   None of this is information that relates to any of the offenses at  
18   issue in this case or the lesser included offenses. It's really --  
19   the government's sort of confused about its reason for being in  
20   there, but we assume it relates to the sort of why he did something  
21   else. It's not relevant at all.

22           MJ:   Okay. I understand where you're going.

1           ATC[CPT MORROW]:     At least for that piece of information. So,  
2   the government's position there is that really we are -- if you look  
3   at the statement, I'm sure you've read it, Your Honor, you seem to  
4   read everything. It really is comprised of multiple examples of sort  
5   of information that really doesn't relate to the facts and  
6   circumstances surrounding the offenses. The government acknowledges  
7   that the providence inquiry can sometimes go into places that, you  
8   know, may be somewhat attenuated from what the actual offense is, but  
9   in this case, I mean, the accused is explaining some personal things  
10  in his life. He's explaining why he entered the Army, what he liked  
11  about being an analyst, what he didn't like about being an analyst.

12           MJ: Those are sometimes standards questions I would ask someone  
13  before I even began a providence inquiry just to establish a rapport.

14           ATC[CPT MORROW]:     That's fair enough, Your Honor. I guess the  
15  government's position there is a lot of the information here is sort  
16  of far field from even that.

17           MJ: Okay. I understand that.

18                   Let's move into -- and again, I want to hear from both  
19  sides. The governments already said as far -- I'm going to tailor  
20  the providence inquiry to ask questions about the offenses and to be  
21  on the lookout for any defenses that may be raised. The government's  
22  arguments to me about uncharged misconduct I do have a concern about,

1 Mr. Coombs, and I'd like you to address that, please. I'm not  
2 interested in eliciting uncharged misconduct from PFC Manning.

3 Let's move on to your second thing about documents.

4 ATC[CPT MORROW]: The actual statute itself, Your Honor?

5 MJ: Yes. Now, you've charged with reason to believe.

6 ATC[CPT MORROW]: We have, Your Honor. We can explain that.  
7 There's been enough litigation over sort of the documents clause and  
8 the intangible items clause, if you want to call it that, that the  
9 government, when it wrote the specifications decided to include the  
10 additional language with reason to believe such information could be  
11 used to the injury of the United States.

12 MJ: So were you charging it in the alternative?

13 ATC[CPT MORROW]: No, it's not in the alternative, Your Honor,  
14 but it's a -- it is -- the government thought it was prudent to  
15 include that in the specifications so that there was no question that  
16 all the elements, if in fact the Court decided, hey, this additional  
17 requirement also applied to the documents clause that the element was  
18 actually in the specification.

19 MJ: So, as I understand the government, are you telling me that  
20 you actually charged -- your intent was to charge the documents  
21 clause, which wouldn't include the reason to believe piece, because  
22 that's extraneous for the documents, including to the case law that  
23 you ----

1           ATC[CPT MORROW]:     That's correct, Your Honor.

2           MJ:   You're citing to me I believe *United States v. Steele* says

3 the same thing. Then it's superfluous language or are you ----

4           ATC[CPT MORROW]:     It is. I mean, Your Honor, ----

5           MJ:   ---- saying you're not sure if it's tangible or intangible

6 and you want both on the table?

7           ATC[CPT MORROW]:     We want to ensure -- it is superfluous

8 language under the documents clause. For the information at issue in

9 this case it would be superfluous language because it's tangible

10 information. Not orally -- not orally disclosed information.

11          MJ:   But you've put it in there as an element?

12          ATC[CPT MORROW]:     We did put it in there and, Your Honor, the

13 government is not taking issue with the fact that it is an element of

14 the specification as written. That's absolutely, 100 percent,

15 unequivocally true. What we're saying is that as a -- if after the

16 providence inquiry, the accused is provident to the lesser included

17 offenses as set out by the defense, the disputed elements essentially

18 left, off the top of my head would be whether he had reason to

19 believe the information could be used to the injury of the United

20 States and then the other disputed element would be whether this was

21 national defense information.

22          MJ:   Yes.

23          ATC[CPT MORROW]:     Right.

1 MJ: As it related to the national defense.

2 ATC[CPT MORROW]: Related to the national defense.

3 MJ: And closely held as a subset.

4 ATC[CPT MORROW]: Closely held as a subset of that, yes.

5 Closely held, might be useful to the enemy. So with that in mind,

6 the government's essentially request here is -- well, the accused

7 could still be found guilty of a violation of 18 United States Code

8 793, without the Court finding him -- without the Court finding that

9 the government has established that he had reason to believe that the

10 information could be used to the advantage of foreign entity.

11 MJ: So is it the government's position today that, going

12 forward from here, that the evidence is presented, the Court can say,

13 "I don't believe that the reason to believe element has been proven;

14 however, that just applies to the information piece, so I'm going to

15 find him guilty except the words, 'with reason to believe could be

16 used to the injury of the United State,'" and he's still guilty of a

17 documentary Article -- 18 United States Code 793(e) violation?

18 ATC[CPT MORROW]: Assuming you found him -- assuming that you

19 found that it was national defense information, Your Honor,

20 absolutely.

21 MJ: There's only one remaining element?

22 ATC[CPT MORROW]: Exactly.

1 MJ: Well, there's two remaining elements because you've charged  
2 the second one.

3 ATC[CPT MORROW]: Yes. There's two remaining elements, but  
4 there is a greater offense. If the accused is provident, there is a  
5 greater offense there that is still a violation of 18 United States  
6 Code, Section 793.

7 MJ: Is it the government's position that documents are a subset  
8 of information or are those two different things?

9 ATC[CPT MORROW]: Information includes documents, yes, Your  
10 Honor. I don't -- can you say that again?

11 MJ: I guess, it would be sort of a lesser included offense or  
12 are they alternate theories that you're relying on?

13 ATC[CPT MORROW]: In the Statute they are alternate theories,  
14 yes, Your Honor.

15 MJ: And the government is relying on both; is that what you're  
16 telling me?

17 ATC[CPT MORROW]: Relying on both, Your Honor?

18 MJ: The government is attempting to prove the offense in the  
19 alternative?

20 ATC[CPT MORROW]: In the -- essen -- well, yes, Your Honor.

21 MJ: Is that what you're trying to do or isn't it? There was  
22 nothing in your request for instructions that said anything about  
23 this.

1           ATC[CPT MORROW]:     That's correct, Your Honor.

2           MJ:   Why not?

3           ATC[CPT MORROW]:     It was an issue that I honestly -- it's my  
4    fault, Your Honor, I left it out of the request for instructions.

5           MJ:   All right.   So just to be clear then, is the government  
6    going forward on alternative theories with respect to the 793(e)  
7    offenses?

8           ATC[CPT MORROW]: The government is going forward on the greater  
9    offense, yes.   But what it ----

10          MJ:   What case law does the government have that there is a  
11   greater offense and a lesser included offense under 793(e)?

12          ATC[CPT MORROW]:     Not a greater offense and a lesser included  
13   offense under 793(e), Your Honor.   The greater offense is the  
14   specification as written.   The -- a what you might term a lesser  
15   included offense is still a violation of 18 United States Code  
16   section 793.   In the written -- as charged in the written  
17   specification.

18          MJ:   You're describing the information as records for the most;  
19   is that correct?

20          ATC[CPT MORROW]:     Yes, Your Honor.

21          MJ:   Then educate me once more, what was the purpose of  
22   including the reason to believe language?

1           ATC[CPT MORROW]:     Your Honor, I mean, really this has been  
2 challenged so much in court that it really was just a matter of the  
3 government's decision to include the additional language because,  
4 number one, it's been challenged several times. In the same way that  
5 every time there's a 793 case there is a vagueness challenge. The  
6 government included the additional language. It's not a difficult  
7 element to prove based on -- as we've been sort of -- as we've gone  
8 through this and you've ruled on what's required to established  
9 reason to believe.

10          MJ: So what the government wants me to do is to tell PFC  
11 Manning that by his plea he is admitting all of the elements except  
12 two, that the information relates to the national defense and that he  
13 had reason to believe that he willfully communicated the information  
14 which would be -- he's already -- would be pleading guilty to the  
15 communication?

16          ATC[CPT MORROW]:     Yes, Your Honor.

17          MJ: That that was done with reason to believe the information  
18 could be used to the injury of the United States or to the advantage  
19 of any foreign nation; however, if the government fails to prove  
20 that, I can still -- the Court, whether it's me or members, can still  
21 find PFC Manning by excepting out that language under the documents  
22 clause. Is that what the government's arguing?



1           ATC[CPT MORROW]:     That's what the government's arguing. Yes,  
2 Your Honor. And if the gover -- if the Court does not want to  
3 instruct the accused at that point during this providence inquiry, we  
4 would at least -- the government would at least ask that that  
5 instruction be given or you wouldn't need to instruct at trial ----  
6           MJ: If I'm ----  
7           ATC[CPT MORROW]:     ---- but at least ----  
8           MJ: If this is a -- I've got notice of a forum.  
9           ATC[CPT MORROW]:     Exactly.  
10          MJ: But it hasn't actually been done yet, but even if I would  
11 instruct the members, if I were the fact finder, I would certainly  
12 follow the instruction that I would give to the members.  
13          ATC[CPT MORROW]:     Yes. If that was the case. If there were  
14 members.  
15          MJ: Whatever elements -- The accused's plea establishes and  
16 whatever elements are left I'm going to be talking to PFC Manning  
17 about in 2 days.  
18          ATC[CPT MORROW]:     Yes, Your Honor. Really that was all -- it  
19 was really the intent of the government by putting in this request  
20 early to ensure that all the parties were the same as Major Fein  
21 said, operating in the same environment. It does have -- it is a  
22 consequence, I mean, a plea has a consequence and a violation of 793

1 is still a 10-year offense. What PFC Manning is pleading to is a 2-  
2 year offense.

3 MJ: I'd like to the parties, both sides, to address this.  
4 Assuming I give -- I tell PFC Manning exactly what you just said, do  
5 the parties believe that by his plea he is -- he'll be establishing  
6 the res of what is communicated, "I communicated more than one  
7 classified -- "well, let's not use that one, the combined information  
8 data network agency thereof, to wit: the combined information data  
9 network exchange Iraq database. Now, that says what is communicated.  
10 That does not -- do the parties believe that by that PFC Manning is  
11 admitting that it's a document or its information for purposes of  
12 793(e)? I mean, he's communicating the thing.

13 ATC[CPT MORROW]: Yes, Your Honor. At that point I think that  
14 he would be admitting that he communicated the thing, the tangible  
15 item.

16 MJ: Because for the lesser included offense that he's pleading  
17 guilty to, does it make any difference whether it's information or  
18 whether it's a document?

19 ATC[CPT MORROW]: No, Your Honor. He's communicating the  
20 thing, so it would be a common fact or element. It would be a common  
21 fact for the greater offense.

22 MJ: So does the government believe that one of the remaining  
23 elements that would still have to be proved then would be that it's

1 either information or that it's documents or are the other pieces of  
2 information -- well, in this case, he drew a lot of records, so it  
3 would be that portion of the statute.

4 ATC[CPT MORROW]: No, Your Honor. I think that's -- if it's  
5 established that he transmitted or willfully communicated a thing, a  
6 tangible item, then that would be -- there would be no further need  
7 to prove that it was documentary information.

8 MJ: So the only two elements -- well, the only potential  
9 elements at issue would be whether it related to the national  
10 defense, which is for both information, intangible and tangible  
11 information.

12 ATC[CPT MORROW]: Yes.

13 MJ: And if it's tangible information or as the statute  
14 describes it, they have a number of ways to describe it, the it's --  
15 the reason to believe element wouldn't apply?

16 ATC[CPT MORROW]: That's correct, Your Honor. The additional  
17 requirement wouldn't apply -- would not apply.

18 MJ: Okay. Now, you talked earlier about sentencing. Now, what  
19 -- I thought I heard a government objection to sentencing because the  
20 accused can provide an oral or written statement either under oath,  
21 sworn or unsworn in sentencing.

22 ATC[CPT MORROW]: Yes, Your Honor.

23 MJ: So what's wrong with this statement in sentencing?

1           ATC[CPT MORROW]:     It goes back to the nexus between what the  
2   accused is providing and what is a fact or circumstance surrounding  
3   the offense. The government's position here is the statement itself,  
4   because it's so far afield from the facts and circumstances  
5   surrounding the actual offenses, that the information should not be  
6   -- essentially the statement should not be used at sentencing.

7           MJ: What part of the statement would be inadmissible in  
8   sentencing?

9           ATC[CPT MORROW]:     It's not that it's inadmissible, Your Honor,  
10   but this goes back to if something is not related to the facts and --  
11   it's not relevant on the merits. If it's not related to the facts  
12   and circumstances surrounding the offenses, then what essentially  
13   this statement does is it is available to the accused on sentencing  
14   without the government's ability to cross-examine the accused. It's  
15   essentially there. It's a matter of -- it's essentially sworn  
16   testimony without ----

17          MJ: I see what you mean.

18          ATC[CPT MORROW]:     ---- the cross-examination.

19          MJ: So if he didn't say it was under oath and just made a  
20   statement and said, Bradley Manning, then it would be an unsworn  
21   statement?

1           ATC[CPT MORROW]:     Right, Your Honor.  At that point there --  
2   it would essentially, but it might be available and to that point the  
3   government would still have the ability to rebut the statement.

4           MJ:  Rebut the factual information in the statement ----

5           ATC[CPT MORROW]:     Exactly.  Yes.

6           MJ:  ---- but not be able to cross-examine PFC Manning?

7           ATC[CPT MORROW]:     Yes, Your Honor.  And this goes -- and so  
8   going full circle back to what you started with.  If this isn't -- if  
9   this is something that the Court's going to read and it's not  
10  evidence and it's established -- it helps support and establish  
11  rapport during the providency inquiry but it's not -- you know, it's  
12  not admitted as a defense exhibit, it's not evidence.  The government  
13  -- a lot of the government's concerns are alleviated.

14          MJ:  Let me just look through your motion one more time to see  
15  if there is anything that I have here.  It's a long motion.

16                 All right.  I think I understand the government's position.

17          ATC[CPT MORROW]:     Thank you, Your Honor.

18          MJ:  Mr. Coombs?

19          CDC[MR. COOMBS]:     Your Honor, first with regards to just the  
20  marking of it, it was marked as a defense exhibit only because that  
21  seemed to be the most logical way, but not with any intent or goal to  
22  have it be admissible evidence in the merits.  Our position is that  
23  the providence inquiry statement, in this instance, is because it is

1 in our parlance a naked plea. Normally, if you have a plea that is  
2 part of a pretrial agreement, obviously you're going to have a stip  
3 of fact and that's going to help formulate the circumstances around  
4 the offense for the Court to understand what happened, and then  
5 formulate the questions for the providence inquiry. When you don't  
6 have a pretrial agreement, obviously you don't have stip of fact,  
7 that's where a statement from the accused in this case, PFC Manning,  
8 is helpful. Now, in this instance the statement is being offered to  
9 be used by the Court during the providence inquiry and then also  
10 obviously anything that's said during the providence inquiry can be  
11 considered by the Court in sentencing.

12 MJ: Let me ask you a question on that.

13 CDC[MR. COOMBS]: Sure.

14 MJ: I remember I put out in the beginning here I'm not aware of  
15 any authority that allows you to put in a sworn statement as part of  
16 -- for me to use as providence inquiry for PFC Manning, a sworn  
17 written statement. I said earlier, my intent would be to preferably  
18 get an unsigned version that I can use and PFC Manning can use during  
19 the providence inquiry to understand the factual interplay and then I  
20 can ask him questions. We can get all of this on the record, and  
21 whatever is on the record in the providence inquiry is what can be  
22 used at sentencing.

1 CDC[MR. COOMBS]: Well, the authority -- we cite the *Irwin*  
2 case in our motion, where in that instance you also had a guilty plea  
3 without the benefit of pretrial agreement and without the benefit of  
4 a stip of fact. There, although not written, it's still under oath.  
5 The whole reason here it's under oath is because anything he says has  
6 to be under oath during the providence inquiry. But there the  
7 accused went on and discussed the when, why, how of his offense and  
8 he went on two times for three pages and six pages consecutively  
9 without the Court's interruption. The defense's position is when the  
10 accused is pleading guilty, he or she has the ability to convey to  
11 the Court why they believe they're guilty. That's one of the  
12 requirements of the Court, to get from the accused's own words why  
13 the accused believes he or she is guilty of an offense. The ability  
14 to submit a statement to the Court, we would say, falls under the  
15 authority of the accused -- well, actually the requirements of the  
16 Court to get from the accused's own words why he or she believes  
17 they're guilty.

18 Again, the main concern by the government seems to be that  
19 we're trying to circumvent cross-examination by offering this  
20 information. That's simply not the case because obviously it's not  
21 going to be used for the merits. Even in sentencing, if we were  
22 going to try to offer something as -- you still have the requirements  
23 under R.C.M. 1001 to have it fit within something that the Court

1 could consider if you're going to argue it for a mitigating  
2 circumstance or an aggravating circumstance. It just so happens in  
3 *Irwin* case the government said, "Hey, what he said during the  
4 providence inquiry is helpful. We would like to use that as an  
5 aggravating circumstance." The Court said that was permissible.

6 MJ: That's true for an aggravating circumstance, but is there  
7 any case authority that the defense can cite to me -- normally the  
8 accused has an opportunity to make a sworn statement, which if he  
9 does, it's subject to cross-examination by the government.

10 CDC[MR. COOMBS]: Yes, Your Honor.

11 MJ: Or an unsworn statement or no statement.

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: So is there any case that you can cite to me where the  
14 defense has gone back to the providence inquiry and tried to use  
15 something for mitigation or extenuation?

16 CDC[MR. COOMBS]: Well, I mean, just from ----

17 MJ: It's not subject to cross-examination.

18 CDC[MR. COOMBS]: Just from anecdotal, I mean, anything that  
19 the Court considers or receives from a providence inquiry can be  
20 considered in formulating an appropriate sentence. Even though this  
21 is not necessarily information, often times I have done in the past  
22 talking about the accused's answering a Court's questions during the  
23 providence inquiring in a very straight forward manner. I'm not --



1 the Court not having to pull from the accused why he or she is  
2 guilty, that as a mitigating circumstance. So that would be an  
3 example of using the providence inquiry for the actual sentencing.  
4 MJ: But I guess the better example would be, assume this is a  
5 members case. In a members case the members weren't there for the  
6 providence inquiry, so if either side wanted to use it, they would  
7 have to somehow bring that information before the members. Is there  
8 any authority for the defense being able to go back and say, "Well,  
9 this was all said under oath, so therefore it's a sworn statement and  
10 members, here you go," because it's not subject to cross-examination.

11 CDC[MR. COOMBS]: Well, I mean, in that instance, I think if  
12 you were -- if you're trying to bring something from the providence  
13 inquiry in front of the members -- well, you could play a portion of  
14 the providence inquiry for the members or if you had somebody in the  
15 courtroom, you could put them under oath, if for some reason you  
16 didn't want to put the accused on the stand in order to testify to  
17 that same factor.

18 MJ: In every case that at least I'm aware of it's been the  
19 government that's used it for aggravation. I'm not aware of any  
20 authority that would let the defense do that. The accused, if he  
21 wants to bring something under oath, in sentencing has to testify  
22 under oath.

1 CDC[MR. COOMBS]: Well, again -- well, it does -- yeah, if you  
2 want to bring it under oath during sentencing, sure. In this  
3 instance you'd be offering something from the providence inquiry. It  
4 wouldn't have the same effect of testimony or oath during sentencing.  
5 The only requirement or limitation under *Holt* would be whether or not  
6 it fits within R.C.M. 1001. There it would be offered -- like we  
7 wanted offers ----

8 MJ: It would be hearsay.

9 CDC[MR. COOMBS]: Well, no, not -- well, again, if you were  
10 offering a portion of the providence inquiry statement and you're  
11 having somebody come up and testify to it, or you're playing a  
12 portion of that, that wouldn't be under oath during the sentencing,  
13 no. If the defense wanted to bring it in, they'd have to ask the  
14 rules to be relaxed in order to bring that portion of information in.  
15 That's how you would bring it in. The only reason we have an oath  
16 issue here is because one of the requirement under providence inquiry  
17 before you ask questions, you need to be put under oath. Here the  
18 statement isn't a sworn statement. It's not an under oath statement  
19 that's offered to the Court, but PFC Manning will adopt it under oath  
20 so that there now appears the protections for the government. If  
21 there is anything that is false in it, the Court obviously will  
22 inform PFC Manning that he could be charged with perjury for anything  
23 that might be false in that statement. If the government has some

1 information to rebut that, certainly during sentencing they could  
2 offer rebuttal information.

3 MJ: Mr. Coombs, here's what I'm going to do with this, I'm  
4 going to -- I would like an unsigned version of the statement that I  
5 can use during the providence inquiry. PFC Manning will have a copy  
6 of the statement too. We'll go through our questions. You can --  
7 PFC Manning and I during our discussions, he can have some latitude  
8 in explaining when we go through our questions, but he's going to do  
9 it orally. I don't want any sworn, written statements in the  
10 providency.

11 CDC[MR. COOMBS]: On that, there is a logistical problem. PFC  
12 Manning created the statement, he typed the statement, so there is no  
13 existence of that statement other than PFC Manning's typed version of  
14 the statement, and then copies of his typed version.

15 MJ: Okay. Then white out the signature block.

16 CDC[MR. COOMBS]: Okay. I mean, if that's -- that's what I'm  
17 saying is the logistical issue. Then the defense's understanding is  
18 the Court wanted PFC Manning to read that statement. Does the Court  
19 still want him to read that statement?

20 MJ: I would prefer that PFC Manning answer my questions. I am  
21 going to give latitude in the providence inquiry. I understand it  
22 goes a little bit beyond, but it does have to be tied to the  
23 offenses. To the extent that PFC Manning's statement has nothing to

1 do with the offenses, he can read -- try to read it, but I'm going to  
2 stop him.

3 CDC[MR. COOMBS]: And in that instance, with regards to his  
4 statement, everything in that statement is either -- in the defense's  
5 position is either directly related to the offense that he's pleading  
6 guilty to, or explains the why. The why he committed the offense,  
7 which the defense's position is he would be able to explain that to  
8 the Court. In fact, that is something that the Court should draw  
9 from him in order to ensure he's giving a knowing, voluntary and  
10 intelligent plea.

11 MJ: Okay. The documents that we use will be -- or at least the  
12 one before the Court that will be marked as an Appellate Exhibit will  
13 be unsigned. We'll go back and forth. Defense, if you want him to  
14 read the statements, you can go ahead and -- I don't want to have a  
15 straight narrative all the way through, but in response to some of my  
16 questions, he can certainly refer to it.

17 CDC[MR. COOMBS]: No, I mean, that was just -- the defense's  
18 position on that was we didn't -- it didn't matter to use whether or  
19 not the Court just read it or PFC Manning read it. My understanding  
20 was in a previous 802 the Court indicated, you were implying you want  
21 him to read it. We're not asking for either him to read it or for  
22 the Court to read it specifically.

23 MJ: You mean out loud?

1 CDC[MR. COOMBS]: The defense's understanding based upon the  
2 previous 802, was that the Court would have PFC Manning read the  
3 statement out loud. The defense is not requesting that, but if  
4 that's the Court's desire, PFC Manning would read the statement out  
5 loud.

6 The statement was really created by PFC Manning in order to  
7 give the Court background facts, in order to inform the Court of the  
8 circumstances surrounding the offenses he's pleading to so that you  
9 could ask your providence inquiry questions. We're not asking for a  
10 specific right of PFC Manning to read it, just simply indicating  
11 that my understanding was that the Court wanted him to read it. He's  
12 prepared to do so.

13 MJ: Let me take another look at it tonight and get back to you  
14 on that. I mean, he could certainly use it at this point to shape  
15 his answers to my questions. I will use it to educate myself as to  
16 PFC Manning's plea.

17 Now, what's the position of the defense now with respect to  
18 what Captain Morrow brought up about uncharged misconduct?

19 CDC[MR. COOMBS]: Yes. Now, with -- certainly the government  
20 can look at it as other bad acts issue. It would fall ----

21 MJ: What are we talking about just so I can see an example of  
22 this?

1 CDC[MR. COOMBS]: That's the example that they pointed with  
2 regards to the federal police -- I believe that was on page ----  
3 ATC[CPT MORROW]: Page 24, Your Honor.  
4 MJ: 24? Okay.  
5 CDC[MR. COOMBS]: ---- 24 and 25. That circumstance there and  
6 there are some other testimony that will be elicited from various  
7 witnesses to corroborate this instance, but this goes into the why as  
8 part of his why of why he would have released certain information to  
9 WikiLeaks.  
10 Now, sometimes when an accused explains the why in a  
11 providence inquiry that may be an aggravating factor, and that may  
12 also relay uncharged misconduct. When it's in a stip of fact,  
13 normally the Court will say, "I'm not going to consider that," but  
14 not required to I guess.  
15 In this instance, even though this technically is uncharged  
16 misconduct, the defense's position is that it explains the why of the  
17 offense and we recognize that it is uncharged misconduct, but we  
18 don't believe that it's damaging to PFC Manning.  
19 MJ: So if PFC Manning starts talking to me about what's here on  
20 Page 24 and 25, is the defense waiving any challenge on appeal that I  
21 am trying to elicit uncharged misconduct?  
22 CDC[MR. COOMBS]: Yes, Your Honor.  
23 MJ: And has the defense and PFC Manning talked about this?

1 CDC[MR. COOMBS]: Yes, Your Honor. We've gone through -- PFC  
2 Manning did an initial written version and in that, as I said in my  
3 response motion, there was a lot of information that I conveyed to  
4 him that needs to come out. We went through and already word-smithed  
5 it. What's remaining in his statement that he typed from his hand  
6 written version is information that the defense is waiving any  
7 objection to the Court considering it.

8 MJ: PFC Manning, you just heard what the -- the communication  
9 that Mr. Coombs and I just had with respect to uncharged misconduct.  
10 Do you know what uncharged misconduct is?

11 ACC: Yes, Your Honor.

12 MJ: What is it?

13 ACC: Uncharged misconduct is the offenses that I have not been  
14 charged with.

15 MJ: Let me just give you an example for -- a very simple  
16 example. I'm talking to someone who's been charged with using  
17 marijuana. The person also distributes it. If I'm going into a  
18 dialogue with the person about distributing the marijuana, I'm really  
19 going beyond where I need to be going to establish the fact that he  
20 only used marijuana. Normally, a defense counsel would be standing  
21 up announcing, "Objection. Objection. Objection. He's not charged  
22 with distributing." I would be reined in, if you will.

23 ACC: Yes, Your Honor.

1 MJ: In your particular case, sometimes you can have things that  
2 go both ways. There may be uncharged misconduct, but they may also  
3 explain why you did what you did.

4 Have you had conversations with Mr. Coombs about your  
5 statement?

6 ACC: Yes, Your Honor.

7 MJ: Do you -- you just heard me ask Mr. Coombs if he waived any  
8 issues of uncharged misconduct with your statement. What waiving  
9 means is you give up your right to contest that on appeal. If it  
10 gets to appeal, the appellate courts will say, "Oh, they waived  
11 that," so even it was an error it doesn't matter.

12 ACC: Yes, Your Honor.

13 MJ: Do you understand that?

14 ACC: Yes, Your Honor.

15 MJ: Do you agree to -- with Mr. Coombs, to waive any M.R.E.  
16 404(b) uncharged misconduct issues with respect to your statement?

17 ACC: Yes, Your Honor.

18 MJ: Okay. Proceed, Mr. Coombs.

19 CDC[MR. COOMBS]: Your Honor, clearly the Court can consider  
20 this in the providence inquiry, and then again the Court can consider  
21 any statements made by PFC Manning during sentencing. From the  
22 defense's position, that's all we're requesting the Court to do.  
23 We're not asking, again, for this to be considered on the merits.



1           Subject to your questions on that portion, there's really  
2 nothing else that the defense has to say on that statement.

3           MJ: Based on the filings, I just want to ask both sides this  
4 question. My understanding of the law is that PFC Manning can plead  
5 guilty to lesser included offenses. I advise him that that  
6 establishes elements a, b, c and d of the lesser included offense and  
7 the ones left over are elements e and f. The government doesn't have  
8 to prove elements a, b, d, and e because you've already admitted to  
9 them in your plea, but during the merits portion of the case, I can't  
10 consider anything he said to prove the greater elements or another  
11 offense.

12          CDC[MR. COOMBS]: That is correct, Your Honor.

13          MJ: All right. Is that the government's understanding?

14          ATC[CPT MORROW]: We agree, Your Honor.

15          MJ: Okay. I wasn't sure on the pleadings whether there was a  
16 meeting of the minds with respect to that.

17          ATC[CPT MORROW]: That issue never came up. It wasn't part of  
18 our pleading. The defense certainly raised that, but we agree that it  
19 can't be used for the contested elements.

20          MJ: Okay. Now, Mr. Coombs, we haven't gotten to the portion of  
21 the government's argument that says that these are actually documents  
22 as opposed to intangible information. The intangible piece -- it's  
23 the intangible piece that carries the reason to believe element with

1 it and the reason to believe *mens rea* with it, not the documents  
2 piece according to the case law as I understand it. Do you agree  
3 with that?

4 CDC[MR. COOMBS]: I agree with that *Rosen* and *Drake* lay out  
5 the what is the so called documents clause and information clause.  
6 The idea that the information clause is the only one that carries  
7 with it the reason to believe added *mens rea* requirement.

8 MJ: I believe there's a third -- there's a keynote case out of  
9 the Third Circuit and *Steele* from the Army Court of Criminal Appeals  
10 said the same thing.

11 CDC[MR. COOMBS]: Yes. The *Steele* case though, the  
12 unpublished opinion, kind of highlights a confusion with in the  
13 military jurisprudence. Even though there is this -- at least from  
14 these cases a recognized documents clause, information clause and  
15 only information clause carries the greater *mens rea*, when you look  
16 at *Diaz*, and *Diaz* involved a, as the Court knows, an individual who  
17 actually printed something off of the JDAMS for GTMO, cut up the  
18 names and then mailed it. There the issue was the defense arguing  
19 that you had to show an evil intent. C.A.A.F. in *Diaz* said the *mens*  
20 *rea* requirement contained in 793(e) is clear. It does not include an  
21 element of bad faith or ill intent. The *mens rea* prescription in  
22 793(e) pertains to whoever having information related to the national  
23 defense, which information the possessor has reason to believe could

1 be used to the injury of the United States or to the advantage of a  
2 foreign nation, willfully communicates, delivers, transmits. The  
3 critical language, of course, is the accused had reason to believe,  
4 could be used.

5           So *Diaz* doesn't lay out this idea of a documents clause,  
6 information clause distinction. This is really a creation of a few  
7 of the circuit courts. That might have gotten to why the government  
8 believed that there was a need to charge this in a way that included  
9 the reason to believe language.

10           The *Steele* case, which was an unpublished opinion case,  
11 goes through the idea and points to *Rosen* and *Drake* and repeats this  
12 principle of a documents clause, information clause. Then they end  
13 up -- after doing all of that, they end up going back to -- in this  
14 instance saying essentially the documents clause provision is what  
15 was proven. Their exact language is, "The evidence regarding the  
16 nature of the information amply demonstrated the appellant had reason  
17 to believe it could be used to the injury of the United States or to  
18 the advantage of any foreign nation. The *mens rea* requirement of  
19 793(e) was clearly met." Even in *Steele* after they go through the  
20 whole discussion of document clause, information clause, they end up  
21 going with the information clause. Even though within the facts they  
22 lay out an opinion, at least, that they thought it was all documents,  
23 tangible.

1           That leads to kind of a second confusion area, this idea of  
2   tangible, intangible. The Court asked is there still a requirement  
3   to prove its document or intangible or information that he's being  
4   charged with. When you look at 793, 793 lays out two types of NDI,  
5   documents, writing, code book, signal book, sketch, photograph, blue  
6   print, plan, map, model instruction, and then information that the  
7   accessor has reason to believe could be used. The cases that made  
8   this distinction between document and information clause then make it  
9   a distinction between tangible and intangible. There the defense's  
10   argument is in this instance we're dealing with all intangible  
11   information, information that exists in ones and zeros. It's only  
12   when you print it out that you have now a document that would fit  
13   within what would be considered a documents clause, provision.  
14   That's one wrinkle to a problem here that still is intangible. It  
15   would be the information and the reason to believe requirement.

16           The other problem is, at least our highest court, in *Diaz*  
17   dealing with a document, clearly a document is this is something that  
18   was printed out and then cut into just the names, put into a card and  
19   then sent. Without a shadow of a doubt, that's a document. Yet,  
20   C.A.A.F. indicated that the 793(e) *mens rea* was the reason to  
21   believe.

22           MJ: But that wasn't what was at issue in *Diaz* though, right?

1 CDC[MR. COOMBS]: What was at issue in *Diaz* was whether or not  
2 you had the added requirement of showing an evil intent. Even though  
3 that wasn't central an issue in *Diaz*, the Court spells out what they  
4 believe the *mens rea* contained in 793 is clear. It doesn't require  
5 the bad faith, ill intent; it does require information related to  
6 national defense information being in the possession of -- the reason  
7 to believe. They indicate that the 793 requirement is clear, that  
8 you need to prove reason to believe. If the documents clause,  
9 information clause had some sway in military jurisprudence, you would  
10 expect the Court here to say, "Not only are you wrong about evil  
11 intent, but you're also missing the boat on even the requirement to  
12 show reason to believe." You don't need to show that. That only  
13 applies to information. You have a document that you cut up and  
14 sent, so you fall under the documents clause.

15 The defense's position is this should have been something  
16 that litigated a long time ago, if the government was in fact trying  
17 to either plea in the alternative or rely upon a variance for failure  
18 of proof. Having not done that they pled it, they own it, it's  
19 reason to believe.

20 MJ: Well, this creates -- this presents a dilemma for the  
21 Court, because normally in a situation like this -- because I agree  
22 with you, there was nothing in the proposed instructions whatsoever  
23 to lead the Court to indicate that the government was going on

1 alternative theories or anything else like that. Normally, I would  
2 have the parties brief the issue and decide this or have it addressed  
3 at the next Article 39(a) session. Where does that put us with PFC  
4 Manning's plea? Is there a way to take the plea -- or is there --  
5 does the -- does that issue impact on the plea?

6 CDC[MR. COOMBS]: It does not, Your Honor. This is an issue  
7 that I have covered with PFC Manning, the difference between  
8 documents clause, information clause, the fact that the government's  
9 position is such that if they fail to prove the reason to believe,  
10 they would still be arguing that, "Okay, you can just strike that  
11 from the specification, just mark through it and we still have a  
12 completed 793, which carries with it a 10-year max." PFC Manning  
13 understands the difference and understands that I'm arguing that  
14 documents clause, information clause shouldn't be applicable here.

15 MJ: Does the defense have any objection then, when I speak with  
16 PFC Manning, if we have that discussion that there's a possibility --  
17 the government's arguing -- they've charged documents, which doesn't  
18 require a reason to believe -- that PFC Manning had a reason to  
19 believe that the communication could cause harm -- let me get the  
20 actual language here.

21 CDC[MR. COOMBS]: Your Honor, in your definition it means the  
22 accused knew facts from which he concluded or reasonably should have  
23 concluded the information could be used for a prohibited purpose,

1 that's the reason to believe. Then under the actual requirement to  
2 the offense ----

3 MJ: Yeah, that the accused had reason -- that knew facts from  
4 which he concluded or reasonably should have concluded that the  
5 information could be used for prohibited purpose. That's not the  
6 element. The elements says ----

7 CDC[MR. COOMBS]: That's the definition of reason to believe.

8 MJ: The accused had reason to believe classified records,  
9 classified memorandum, videos and files described for each  
10 specification could be used to the injury of the united States for  
11 the advantage of any foreign nation.

12 CDC[MR. COOMBS]: Right, Your Honor.

13 MJ: Now, if I speak with PFC Manning and I say -- this is still  
14 -- I just asked the parties to brief this issue and I could go either  
15 way. There may be one element left or there may be two elements  
16 left, potentially. Do you think that that impacts on the plea?

17 CDC[MR. COOMBS]: No, Your Honor.

18 MJ: Government?

19 ATC[CPT MORROW]: If the defense doesn't believe it impacts  
20 the plea then we don't.

21 MJ: PFC Manning, you've just been listening to our discussion.  
22 Please advise me what your understanding is of 18 United States Code

1 793(e) with respect to tangible versus intangible or documents versus  
2 information.

3 ACC: Well, the documents would be tangible objects. Like this  
4 sheet of paper [holding up paper] would be a document. The  
5 intangible things would be sort of the zeros and ones, the digital  
6 media type information or verbal. It could be communicated orally as  
7 well.

8 MJ: Okay. So do you understand what the parties -- what your  
9 defense is arguing and what the government is arguing? Your defense  
10 is arguing that under military jurisprudence it doesn't matter  
11 whether it's documents or it's intangible, it still requires that you  
12 had reason to believe that the information could be used to the  
13 injury of the United States or the advantage of any foreign nation?

14 ACC: Correct, ma'am Correct.

15 MJ: The government's position is the documents, they can sever  
16 that element out and you're still -- you can still be found guilty of  
17 the offense. Do you understand that?

18 ACC: Yes, Your Honor.

19 MJ: Right now I haven't ruled on that because I've asked the  
20 parties to brief that issue because it just appeared before me with  
21 respect to your plea. I could go either way.

22 ACC: Okay. Yes, Your Honor.



1 MJ: Now, I want you and your defense counsel to talk about  
2 this. You could do it over the overnight recess and when I ask you  
3 tomorrow if you still want to plead guilty, I just want to make sure  
4 -- well, do you understand what's at issue?

5 ACC: Thursday, Your Honor.

6 MJ: I understand that. All right. We'll talk about it --  
7 well, your counsel will tell me if we're still going to go forward on  
8 Thursday, but we can -- I'll ask you on Thursday if you still want to  
9 go forward with your plea understanding that this issue is still up  
10 in the air. There may be one element or there may be two that the  
11 government is required to prove.

12 ACC: Yes, Your Honor.

13 MJ: So you understand the issue?

14 ACC: Yes, I do, Your Honor.

15 MJ: So then, why don't you all discuss it and then you can come  
16 back to me either tomorrow or Thursday morning on whether you desire  
17 to still go forward with the plea. You know, if you desire to wait  
18 until the next session after this issue is litigated, I'm perfectly  
19 happy to do that as well. If it doesn't impact the plea, then we can  
20 go forward with this session.

21 CDC[MR. COOMBS]: Yes, Your Honor.

22 MJ: All right. Is there anything else we need to address with  
23 respect to this motion?

1 ATC[CPT MORROW]: Just a couple of things, Your Honor.

2 MJ: Yes. Well, first of all does the government have any  
3 objection if PFC Manning reads his statement?

4 ATC[CPT MORROW]: Yes, Your Honor. Part of this is -- and  
5 that's actually -- that's why we filed the motion in the first place,  
6 Your Honor, because the script -- the defense script included the  
7 potentially note or place for the accused to read the statement under  
8 oath as part of the providence inquiry.

9 MJ: No. Oh, read the statement under oath. Okay.

10 ATC[CPT MORROW]: So that's why we decided to file the motion  
11 in the first place.

12 MJ: Well, assume -- okay. After we discussed all of this  
13 today, PFC Manning waives objection to uncharged misconduct. What  
14 does the government say -- and I say, "PFC Manning, let's lay out the  
15 --" PFC Manning says, "I want to answer your questions, but I also  
16 want to read this statement that I've prepared in support of why I'm  
17 guilty to these offenses." What's the government's objection?

18 ATC[CPT MORROW]: That goes back to the original purpose of  
19 the filing, Your Honor. The government's position is that the  
20 information within there -- I know we talk a lot about why and the  
21 defense said he has a -- should have the opportunity to explain to  
22 the Court why he believes he's guilty, then that turned into now he  
23 should have the opportunity to explain to the Court why he did what

1 he did. If they think that something in the statement, specifically  
2 the information relating to the Iraqi Federal Police or whatever, was  
3 a reason why he did something, but it's not uncharged misconduct and  
4 they don't believe it's uncharged misconduct, then it has to be  
5 something else, right? The government's position is that from their  
6 perspective they think that's extenuation or mitigation. In that  
7 case, then you've just moved a statement over to sentencing that --  
8 without the government having the ability to cross-examine on it.

9 MJ: Well, let's follow that. I mean, assuming -- is there any  
10 prohibition in a dialogue between a military judge and an accused in  
11 a providence inquiry of potentially having mitigating issues come  
12 out. A lot of people say they weren't thinking straight, they were  
13 drinking, they were ----

14 ATC[CPT MORROW]: Your Honor, I absolutely agree that in the  
15 context of a providence inquiry the give and take between a judge  
16 that there will be probably some aggravation and some mitigation  
17 listed during the inquiry. The government's position is that it is  
18 highly irregular for the accused to be sworn and then to read a  
19 written, prepared statement into the record prior to any colloquy  
20 with the judge. It introduces irrelevant matters into the  
21 proceeding.

22 MJ: Point me once again to the irrelevant matters.

1           ATC[CPT MORROW]:     Well, Your Honor, we would still maintain  
2 that Page 24 and Page 25 are irrelevant.

3           MJ:   Okay.   What else?

4           ATC[CPT MORROW]:     Some of the stuff is cited in the  
5 government's brief, Your Honor.

6           MJ:   Okay.

7           ATC[CPT MORROW]:     I'll have to go through our brief, Your  
8 Honor, quickly.

9                   The accused writes in Paragraph 6(j) -- do you have copy of  
10 the statement, Your Honor?

11          MJ:   Yes.

12          ATC[CPT MORROW]:     The accused writes in Paragraph 6(j), "I  
13 believe that the general public, especially the American public had  
14 access to the information contained within in CIDNE, this could spark  
15 a domestic debate on the role of the military on foreign policy in  
16 general."

17                   Moving on to paragraphs 8(w) and 8(x) ----

18          MJ:   Well, let's talk about 6(j) for a minute.   Defense, I'd  
19 like your perspective on this as well.   If we go through a plea, one  
20 of the -- one of the elements is that the conduct has to be prejudice  
21 to good order and discipline or service discrediting.   If I'm getting  
22 all sorts of testimony that all of this would have been -- created a  
23 debate and done all of that kind of thing, don't I need to go --

1 right now I have the statement. It's been added as a Defense Exhibit  
2 and as an Appellate Exhibit. I know it exists. So for purposes of  
3 the providence inquiry, do I not have to address this with PFC  
4 Manning? Is this service discrediting?

5 CDC[MR. COOMBS]: That's certainly something I considered,  
6 Your Honor, because it certainly raises the issue of a defense to  
7 whether it's service discrediting.

8 MJ: Or whether he's pleading guilty to that element.

9 What else?

10 ATC[CPT MORROW]: Paragraphs 8(w) and 8(x), Your Honor. It's  
11 cited in the government's brief at Page 4. "Over the next few months  
12 I stayed in frequent contact with Nathaniel. We conversed on nearly  
13 a daily basis and I felt we were developing a friendship. The  
14 conversations covered many topics and I enjoyed the ability to talk  
15 about pretty much anything and not just the publications that the  
16 WikiLeaks organization was working on. In retrospect, I realize I  
17 realize these dynamics were artificial and were valued more by myself  
18 than Nathaniel."

19 MJ: All right. What's the objection?

20 ATC[CPT MORROW]: I guess the objection is relevance, Your  
21 Honor.

22 MJ: Well, what's the prejudice to the government if he talks  
23 about that?

1           ATC[CPT MORROW]: Your Honor, I mean, I can't really articulate  
2 an absolute prejudice. It's an irregular -- it's an irregularity in  
3 the proceedings.

4           MJ: Well, I have the government's brief. I'll go through it  
5 and I'll look through those portions of the statements. One thing  
6 that might be -- it's just me from the government's perspective is  
7 perhaps you can go through the statement and look for issues that --  
8 like the service discrediting issue I just raised that you might want  
9 to bring to the attention of the Court.

10          ATC[CPT MORROW]: Yes, Your Honor. Essentially we've done  
11 that -- some of that already.

12          MJ: But do you see where I'm going with this? As opposed to  
13 not talking about it, perhaps I needed to talk about it.

14          ATC[CPT MORROW]: I agree. It certainly has to be explored  
15 now. Again, this was raised because it became part of the -- it was  
16 part of the defense proposed script and it was going to be something  
17 read under oath during the inquiry, without the give and take  
18 necessary as a part of providence.

19          MJ: All right. Captain Morrow, thank you. Anything else?

20          ATC[CPT MORROW]: Just two other things very briefly. We got  
21 the charge sheet from Steele and that specification as it was written  
22 actually included the reason to believe, so that's why they -- in

1 that case they discussed reason to believe as part of the discussion  
2 in the case.

3 MJ: Did the *Diaz* specification?

4 ATC[CPT MORROW]: We can probably get that, Your Honor. I'm  
5 sure we have that in our record. I'm actually pretty confident that  
6 it probably included that as well.

7 MJ: Well, you know we don't have to address that this session  
8 because I'm going to actually put that on the record for the next  
9 Article 39(a) session.

10 ATC[CPT MORROW]: I agree, Your Honor.

11 MJ: I prefer that the parties have an opportunity to look  
12 through this and brief this in more than a day.

13 ATC[CPT MORROW]: I agree, Your Honor. Just for the Court's  
14 -- we also, and this is cited in the brief, but we initially raised  
15 this issue on 16 November, so it was part of the -- when the Court  
16 asked for additional briefs on the -- what would be the maximum  
17 punishment for the lesser included offenses, we included this, sort  
18 of this mini brief within those specifications.

19 MJ: Okay. Well, do me a favor, when you brief this brief, cut  
20 and paste that piece into it and just tell me what you said ----

21 ATC[CPT MORROW]: We did. That's essentially what ----

22 MJ: ---- so I don't have to go back and cross reference.

23 ATC[CPT MORROW]: That's essentially what we did in this.

1 MJ: Okay.

2 ATC[CPT MORROW]: Thank you.

3 MJ: In your brief, where is that piece?

4 ATC[CPT MORROW]: The reason to believe piece, Your Honor?

5 MJ: Yes.

6 ATC[CPT MORROW]: It's at Page 8.

7 MJ: Okay.

8 ATC[CPT MORROW]: Sorry, one more thing, Your Honor.

9 MJ: Okay.

10 ATC[CPT MORROW]: Relating to the intangible versus tangible.

11 The government's position is that the intangible clause is orally

12 disclosed information. It would be sort of absurd to think that

13 documents on a computer are now suddenly intangible when we've -- you

14 entered this in your ruling on speedy trial, you talked about how e-

15 mails are documents, those are of course ones and zeros. Thank you.

16 MJ: You're welcome. Mr. Coombs, any last words?

17 CDC[MR. COOMBS]: Ma'am, I thought you had one issue on

18 paragraph, I guess it was 8 -- I think it was 8(Whisky).

19 ATC[CPT MORROW]: 6(j).

20 MJ: On page -- I'm sorry, which page?

21 CDC[MR. COOMBS]: I'm sorry. It was 6(Juliet).

22 MJ: In the statement?



1 CDC[MR. COOMBS]: Correct, Your Honor. Just indicating what  
2 his belief was with regards to CIDNE, Iraq, and CIDNE, Afghanistan,  
3 how that may be received.

4 MJ: Uh-huh.

5 CDC[MR. COOMBS]: So the Court indicated you were going to  
6 ask, I guess, either myself or PFC Manning a question on that.

7 MJ: I was going to do that during the providence inquiry.

8 CDC[MR. COOMBS]: Okay, Your Honor.

9 MJ: What I'm looking that is -- I'd like you do that too, Mr.  
10 Coombs, when we go through here, if PFC Manning's going to tell me  
11 things like, "I did this for basically a noble motive," then what is  
12 at issue is whether what he did was service discrediting or  
13 prejudicial to good order and discipline for that matter.

14 CDC[MR. COOMBS]: Correct, Your Honor. He understands that,  
15 so he understands what's in the statement and he understands the  
16 elements he needs to plea to.

17 MJ: Okay. So we'll have that dialogue in the event that you  
18 all decide that you all want to go forward with plea on Thursday.  
19 Just I would ask that you speak with PFC Manning and just make sure  
20 that -- you know, in order to be service discrediting it has to  
21 discredit the service. If his testimony to me is, "Well, this was a  
22 noble thing I was doing and it was helping the service," then I've  
23 got to fix that.

1 CDC[MR. COOMBS]: No, we've already had this discussion.

2 MJ: Okay.

3 CDC[MR. COOMBS]: He already knows and he understands his  
4 statement and he understands the elements he needs to plead guilty  
5 to. He does believe that he satisfied the elements.

6 MJ: Okay. All right. So I will take -- I'm going to go back  
7 and reread the statement this evening. I think at this point we have  
8 some parameters. I'm going to have a copy of the statement that's  
9 going to be whited out with a signature block or PFC Manning will  
10 have a copy of the statement. Whether or not he can actually read  
11 the statement, I haven't decided yet. I'm going to think about that  
12 and then I'll let you know tomorrow.

13 The other issues raised, I believe as I understand the  
14 defense and I understand PFC Manning, I've asked the parties to brief  
15 whether under military jurisprudence the documents also require the  
16 reason to believe and that will be handled at the next Article 39(a)  
17 session.

18 You all are going to talk and let me know whether you want  
19 to go forward on this session, because you don't believe that that  
20 makes any difference to whether PFC Manning will enter a knowing,  
21 voluntary and intelligence plea. If so, we'll go forward. If not,  
22 we'll go ahead and punt that to next session.

23 CDC[MR. COOMBS]: We'll let the Court know tomorrow morning.

1 MJ: Okay. Is there any other issue that we need to address  
2 before we recess the Court for the evening?

3 TC[MAJ FEIN]: Your Honor, just one point of clarification, I  
4 apologize.

5 MJ: That's okay.

6 TC[MAJ FEIN]: Earlier you were a little bit more specific when  
7 you asked the defense, Mr. Coombs and PFC Manning, to discuss  
8 tomorrow this issue of 793. I just -- when PFC Manning actually  
9 explained it to you, he also distinguished between the tangible and  
10 intangible, that's what Captain Morrow was talking about. I guess,  
11 the ultimate issue is if PFC Manning is going into tomorrow to make  
12 this decision, ultimately Thursday, believing that tangible is one  
13 type information and intangible is another, that's a subject of  
14 litigation. The decision tomorrow should be exclusive of that  
15 determination. It should just be based off information -- excuse me  
16 documents.

17 MJ: Okay. Let me make sure I understand the defense argument  
18 then based upon what Major Fein said. Is the argument that --  
19 There's documents and there's all of the subsets that you read to me  
20 and then there's information. Is this defense argument that whatever  
21 was communicated by PFC Manning doesn't fall into the subsets, the  
22 documents, etcetera and it's information or -- and/or is it that the

1 Court of Appeals for the Armed Forces has said it doesn't matter what  
2 it is, it still requires the reason to believe?

3 CDC[MR. COOMBS]: The first part for *Diaz*, it appears it  
4 doesn't matter. It's still requires the reason to believe under  
5 military jurisprudence. Other circuits might have identified a  
6 documents, information clause, but we have not in the military.  
7 There is the *Steele* case, but even in that case, as I said, they go  
8 back to saying that the *mens rea* requirement of 793, reason to  
9 believe, was satisfied. That's the first part.

10 The second part, the Court asked Captain Morrow, do you  
11 believe that -- you know, you still based upon your charging you  
12 still have a potential issue of proving it's documents or  
13 information. He said, no, it's just documents. The defense's  
14 position on that is that they still need to prove that, that it falls  
15 within the documents and not the information, if in fact, in military  
16 jurisprudence or more importantly in this case that the Court is  
17 going recognize a distinction between the two.

18 For purposes of the providence inquiry and what the  
19 government is concerned about, I have explained and I will re explain  
20 after today's hearing to Manning, the various nuances of this issue,  
21 to include the Court recognizes a distinction, and then whether or  
22 not the Court used this as the ones and zeros as a document, which  
23 the *Steele* case kind of leaned towards that, if it existed on a

1 computer, or would view that as information. Then what the possible  
2 outcome might be, meaning that you might have two elements that still  
3 survive or just one. Does that make a difference to you in pleading  
4 if the Court goes against the defense in both arguments. I believe  
5 his position, if it's as we covered earlier, would be no, it doesn't  
6 make a difference.

7 MJ: Because -- and let me understand this again, by his plea,  
8 he's admitting he willfully communicated something, but he's not  
9 saying to me what that something is. That would be a legal  
10 determination or -- well, legal or factual -- it would be a factual  
11 determination.

12 CDC[MR. COOMBS]: Right. He's not indicating that it's a  
13 document or information. He's indicating what a -- you know, charged  
14 -- CIDNE information.

15 MJ: All right. I think I understand the defense argument.

16 Does the government have anything further with respect to  
17 that?

18 TC[MAJ FEIN]: No, ma'am. The government's concern is just that  
19 the decisions or the colloquy that the Court will have with PFC  
20 Manning tomorrow just ensures that he's knowingly, intelligently  
21 making that decision. That's it.

22 MJ: Again, if PFC Manning as we go through our colloquy  
23 tomorrow, I'm not making any findings, so ultimately down the road

1 foreseeably if this -- at the next session if I rule differently, I  
2 mean, he could ask to withdraw his plea.

3 CDC[MR. COOMBS]: Yeah, at any time actually before the Court  
4 announces findings. He understands that as well. That is something  
5 that the Court would cover as a standard exchange between him and the  
6 Court.

7 MJ: Is there anything else that we need to address before we  
8 recess the Court today?

9 TC[MAJ FEIN]: No, ma'am.

10 CDC[MR. COOMBS]: No, Your Honor.

11 MJ: All right. 0930 tomorrow?

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: Court is in recess.

14 **[The Article 39(a) session recessed at 1720, 26 February 2013.]**

15 **[END OF PAGE]**

1 [The Article 39(a) session was called to order at 0952, 27 February  
2 2013.]

3 MJ: This Article 39(a) session is called to order.

4 Trial Counsel, are all parties present when the Court last  
5 recessed again present in court?

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: All right. First of all the Court has made modifications  
8 to the order that was discussed yesterday, which was the storage of  
9 Appellate Exhibits not accompanying the record of trial. The  
10 modification the Court made was as follows: adding paragraph 3 to  
11 the findings of fact section, which now reads, "The Court finds the  
12 government's interest in protecting national security and preventing  
13 the dissemination of classified information in the documents off site  
14 is an overriding interest that would be prejudiced if the documents  
15 were not filed under seal and accompanied the record of trial. The  
16 ordered plan for storage of Appellate Exhibits not accompanying the  
17 record of trial is narrowly tailored to protect the overriding  
18 interest and there are no adequate reasonable alternatives."

19 Does either side object to the order?

20 CDC[MR. COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: All right. We'll file it then as the next Appellate  
23 Exhibit in line.

1           Mr. Coombs, have you had an opportunity to discuss with PFC  
2 Manning whether PFC Manning would like to continue with his plea  
3 tomorrow?

4           CDC[MR. COOMBS]: I have, Your Honor.

5           MJ: And?

6           CDC[MR. COOMBS]: Based upon the discussion, yes, he would,  
7 Your Honor.

8           MJ: Is that correct?

9           ACC: Yes, Your Honor.

10          MJ: All right. Just for the record PFC Manning and I had a  
11 dialogue yesterday where PFC Manning answered some questions from the  
12 Court. Those questions and anything you told me I am considering  
13 only for the limited purpose of going forward -- whether you want to  
14 go forward with your plea and offer anything else.

15                So we will do that tomorrow then. We will start once again  
16 at 0930.

17                Today is going to be a relatively short day in court. The  
18 Court is prepared to rule on its -- on the government's motion to  
19 preclude over classification and then we are going to discuss the --  
20 what's known in military parlance as *Grunden* based on a case, but  
21 basically issues regarding closure of parts of the trial for the  
22 presentation of classified evidence. The government has made a  
23 motion to do that and the defense has come up with some alternatives



1 and we're going to hold initially at least that hearing in open court  
2 after I announce the ruling. The Court will be in recess for the day  
3 and we will start up again at 0930 tomorrow to go forward with PFC  
4 Manning's plea.

5 The Article 104 issue that we addressed yesterday that was  
6 litigated, the Court is going to take that under advisement. Also,  
7 either tomorrow or Friday the parties and I will go into an M.R.E.  
8 505(i) in camera hearing to discuss potential classified information  
9 that might be introduced at trial. We are going to go forward on the  
10 assumption during that litigation that I'm going to rule in favor of  
11 the government; therefore, we can litigate all of the issues that  
12 have been raised. That doesn't mean I'm going to rule in favor of  
13 the government, it's just to ensure that we've got all the issues on  
14 the table on the record.

15 Does either side have any objection to that?

16 CDC[MR. COOMBS]: No, Your Honor.

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: Is there anything else we need to address before I announce  
19 the Court's over classification ruling?

20 CDC[MR. COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor. Just one, with an updated  
22 calendar, the government will add to the calendar the filings for the  
23 Article 104 issue for the next session.

1 MJ: All right. And if the parties would confer also, if there  
2 are any additional issues that need to be raised for that session,  
3 just let me know so we can come up with an updated calendar then to  
4 include that as well.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: Government motion to preclude evidence of over  
7 classification.

8 On 14 December 2012, the Government moved to preclude the  
9 Defense from raising general over classification during both the  
10 merits and sentencing phases of the trial. On 28 December 2012, the  
11 Defense filed a response opposing. After considering the pleadings,  
12 evidence presented, and argument of counsel, the Court finds and  
13 concludes as follows:

14 Findings of Fact:

15 1. The accused is charged with one specification of aiding  
16 the enemy in violation of Article 104, Uniform Code of Military  
17 Justice; one specification of disorders and neglects to the prejudice  
18 of good order and discipline and service discrediting in violation of  
19 Article 134, UCMJ; eight specifications of violations of 18 U.S.C.  
20 Section 793(e) and Article 134; five specifications of violations of  
21 18 U.S.C. Section 641 and Article 134 UCMJ; two specifications of  
22 violations of 18 U.S.C. Section 1030(a)(I) and Article 134, UCMJ; and  
23 five specifications of violating a lawful general regulation, in

1 violation of Article 92, UCMJ. The time period of the charged  
2 offenses is from on or about 1 November 2009 on or about 27 May 2010.

3           2. Defense proffers that it will offer the following  
4 evidence for merits and sentencing:

5           A. Mr. Cassius Hall will testify that much of the charged  
6 information could not cause damage to the United States and was not  
7 closely held.

8           B. Mr. Charles Ganiel will testify that the vast majority  
9 of the information within the charged diplomatic cables was already  
10 in the public realm prior to the accused's alleged communications of  
11 that information.

12           C. Ambassador Peter Galbraith will testify that many  
13 Department of State cables are, in his experience, over-classified  
14 and that a secret classification does not mean the information is  
15 genuinely secret.

16           D. House Resolution 553, Reducing Over-Classification Act,  
17 7 October 2010, Transcripts of House Committee Meetings on the  
18 Espionage Act, 16 December 2010, and 2007 Committee Meetings on Over-  
19 Classification 22 March, 26 April, and 28 June 2007. In a separate  
20 motion, the defense requests that the Court take judicial notice of  
21 this information.

22           3. H.R. 553 "Reducing Over-classification Act" was  
23 enacted into law on 7 October 2010 as Public Law 111-258. This was

1 after the dates of the charged offenses and before the Original  
2 Classification Authority (OCA) classification reviews. The Court  
3 will henceforth refer to H.R. 553 as Public Law 111-258.

4           4. Merits - Defense. Defense argues that evidence of  
5 general over-classification is relevant to the merits for the  
6 offenses charged that violate 18 U.S.C. Section 793(e) and 1030(a)(1)  
7 for the following reasons:

8           A. Those offenses require the Government to prove that the  
9 accused had reason to believe information communicated could be used  
10 to the injury of the United States or to the advantage of any foreign  
11 nation. This necessarily requires the fact finder to consider the  
12 nature of the information. Evidence of over-classification is  
13 relevant to the nature of the information.

14           B. For 18 U.S.C. Section 793(e) offenses only: general  
15 over-classification is relevant to whether the information  
16 communicated relates to the national defense. This element requires  
17 that the information be closely held and that the disclosure of the  
18 information would be potentially damaging to the United States or  
19 might be useful to an enemy of the United States.

20           C. Over-classification allows the defense to paint a full  
21 picture of the context in which the classification decisions were  
22 made. The significance of over-classification relates to what weight  
23 the Court should accord to the fact of classification itself to

1 determine whether the accused had reason to believe the documents  
2 could cause damage to the United States and whether the documents at  
3 issue relate to the national defense.

4 D. Over-classification evidence is relevant evidence of  
5 bias of the Original Classification Authorities, allowing both cross-  
6 examination and extrinsic evidence under M.R.E. 608(c).

7 Merits- Government, Number 5. The Government argues the  
8 following to preclude evidence of general over-classification on the  
9 merits as not relevant to any charged offense or cognizable defense:

10 A. Evidence of general over-classification is not relevant  
11 to whether the documents at issue were properly classified by the  
12 relevant OCA.

13 B. The accused is not an OCA and has no authority to  
14 determine whether information could injure the United States with  
15 respect to classification.

16 C. Evidence of general over-classification is not relevant  
17 as to the nature of the information communicated or to determine  
18 whether the charged information could be used to the injury of the  
19 United States or to the advantage of a foreign nation.

20 D. Evidence of over-classification after the dates of the  
21 charged offenses is not relevant to the accused's intent at the time  
22 of the offenses.

1           6. Sentencing: In its Motion for Judicial Notice of H.R.  
2 553 and Congressional Hearings Discussing Classification, the Defense  
3 avers that evidence of general over-classification is relevant to  
4 sentencing in that evidence that the classification system was broken  
5 and its condition had negative consequences for the nation would tend  
6 to shift some of the culpability from the accused to the system  
7 itself, thus tending to lower his punishment. The Government argues  
8 evidence of general over-classification presents neither matters in  
9 extenuation nor mitigation because the information was not in  
10 existence nor known to the accused at the time of the charged  
11 offenses and, even if relevant, should be excluded under M.R.E. 403  
12 as an undue waste of time.

13           7. The Government intends to prove on the merits that a  
14 relevant OCA conducted an original classification review of the  
15 information allegedly communicated in the charged offenses in  
16 accordance with Executive Order Number EO 13526, 29 December 2009.

17           The Law:

18           1. Relevant evidence is evidence having any tendency to  
19 make the existence of any fact that is of consequence to the  
20 determination of the action more or less probable than it would be  
21 without the evidence. M.R.E. 401. Relevant evidence is necessary  
22 when it is not cumulative and when it would contribute to a party's  
23 presentation of the case in some positive way in a matter at issue.

1 The military judge has the initial responsibility to determine  
2 whether evidence is relevant under R.C.M. 401. *United States v.*  
3 *White*, 69 M.J. 236 Court of Appeals for the Armed Forces, 2010.

4 All relevant evidence is admissible, except as otherwise  
5 provided by the Constitution of the United States as applied to  
6 members of the armed forces, the code, these rules, this Manual, or  
7 any Act of Congress applicable to members of the armed forces.  
8 Evidence which is not relevant is not admissible. M.R.E. 402.

9 3. Relevant evidence may be excluded if its probative  
10 value is substantially outweighed by the danger of unfair prejudice,  
11 confusion of the issues, or misleading the members, or by  
12 considerations of undue delay, waste of time, or needless  
13 presentation of cumulative evidence. M.R.E. 403.

14 4. M.R.E. 608(c) provides that bias, prejudice, or any  
15 motive to misrepresent may be shown to impeach the witness either by  
16 examination of the witness or by evidence otherwise introduced. This  
17 rule allows both cross-examination of the witness and extrinsic  
18 evidence.

19 5. R.C.M. 1001(c) governs matters to be presented by the  
20 Defense during sentencing. In relevant part, the rule allows the  
21 Defense to present matters in rebuttal to any material presented by  
22 the Government and matters in extenuation and mitigation. Matters in  
23 extenuation serve to explain the circumstances surrounding the

## INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

**USE OF FORM** - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

**COPIES** - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

**ARRANGEMENT** - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.